83-966

No. ..-....

IN THE

Supreme Court of the United States

October Term, 1983

FAITH CENTER, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Questions Presented.*

1. Whether the judgment of the District of Columbia Circuit affirming the dismissal of Petitioner's license renewal application was obtained by fraud and/or other misconduct committed by the Respondent, where the Respondent intentionally concealed the fact that it received the false allegations prompting its investigation of Petitioner from a former attorney for Petitioner, fired by Petitioner and subsequently suspended from the California State Bar for misconduct, where the making of such allegations, even if true, violated, *inter alia*, the ethical obligations of an attorney to preserve the confidences and secrets of a former client, and the principles undergirding the attorney/client privilege.

2. Whether said judgment was obtained by fraud and/or other misconduct by the Respondent where the Respondent's representations to the District of Columbia Circuit, *e.g.*, that there were "*charges* that the licensee had fraudulently solicited funds" and that "the FCC instituted an informal investigation into Faith's operation of KHOF-TV *after* the agency received a *number of complaints*" thereof were false and fraudulently proffered by the Respondent.

3. Whether the above actions of the Respondent violate federal due process, and/or warrant exercise by this Court of its supervisory power over the courts.

4. Whether the above actions of the Respondent violated Petitioner's rights guaranteed under the Religion Clauses.

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*Petitioner Faith Center, Inc. has no parent companies, subsidiaries, or affiliates within the meaning of S. Ct. R. 28.1.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner, Faith Center, Inc., respectfully prays that a Writ of Certiorari issue to review the final order of the United States Court of Appeals for the District of Columbia Circuit entered on July 13, 1983, denying Petitioner's motion to vacate the judgment of said court entered on April 7, 1982 affirming the dismissal by Respondent of Petitioner's television license renewal application.

Opinion Below.

The order of the Court of Appeals is unreported and is reproduced in Appendix (App.) A, p. 1. The underlying judgment of said Court is unreported and is reproduced in App. B, pp. 2-3. The opinion and order of the Respondent

affirmed by said judgment is reported at 82 F.C.C. 2d 1 (1980), and is reproduced in App. C, pp. 4-67. The opinion and order of the Administrative Law Judge is unreported.

Jurisdiction.

The order of the Court of Appeals was entered on July 13, 1983. On September 26, 1983, Chief Justice Warren E. Burger extended the time within which to file a petition for a writ of certiorari to and including December 10, 1983. App. D, p. 68. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Provisions Involved.

United States Constitution, Amendments I and V, and Title 28 United States Code, Federal Rules of Civil Procedure, Rule 60, which are printed in full in Appendix E, pp. 69-70.

Statement of the Case.

Petitioner, Faith Center, Inc., is a 36 year-old church of congregational polity located in Glendale, California. Petitioner is a non-profit church corporation and a member of the Full Gospel Fellowship of Churches and Ministers, International. Petitioner owns the broadcasting licenses for three television stations and one FM radio station. These are KHOF-TV, Channel 30, San Bernardino, California, KVOF-TV, Channel 38, San Francisco, California, WHCT-TV, Channel 18, Hartford, Connecticut, and KHOF-FM, 99.5 FM, Los Angeles, California, respectively. Each is a specialty license, broadcasting *exclusively* for religious purposes, to wit, the propagation of the Gospel of Jesus Christ, and none sells commercial air time. Dr. Gene Scott, its Pastor, is a duly-ordained minister, who earned his Doctorate in Philosophies of Education from Stanford University in 1957. He has earned his reputation since that time as a

Bible teacher and scholar in more than forty countries throughout the world. Dr. Scott has written numerous books and has won the respect of persons of all religious faiths for his insightful analysis of the Old Testament and its intricate and detailed relationship with New Testament Christianity. Currently, Dr. Scott is serving as the unanimously-elected pastor of Petitioner. Dr. Scott, in addition, is the elected president of the Full Gospel Fellowship of Churches and Ministers, International, an organization of 2,000 member churches and two and a half million adherents worldwide, headquartered in Dallas, Texas. Petitioner also broadcasts over an ever-expanding satellite network, from Seattle to Miami and from Washington, D.C. to Los Angeles.

But it was not always so. The Faith Center of today stands in marked contrast to the Faith Center of 1975 whose only salvation appeared to lie in declaring bankruptcy. $4,000,000 dollars in debt with $19,000 cash, Faith Center, by the unanimous vote of its congregation and its board of directors, turned to Dr. Scott, whose role as financial consultant to churches across the globe rendered him uniquely qualified for the Herculean task of reconstruction that lay ahead. Selfless managerial effort plus the rallying of the supporting audience through the unparalleled preaching of God's Word resulted in the revitalizing of a viable ministry outreach.

Ironically, as will hereafter be shown, it was the very uncompromising nature of Petitioner, led by Dr. Scott, in preserving the separation of church and state, and in particular, preventing unwarranted encroachment of the government into church financial affairs,[1] that was to expose

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[1]Petitioner successfully thwarted attempts by Los Angeles County to tax constitutionally tax-exempt properties of the church, won NLRB reversal of lower administrative rulings that church employees could be unionized, and secured the recognition of the California legislature through the enactment of the Petris Bill that the Attorney-General, then participating in the very investigation subsequently assumed by the FCC and the subject of the instant litigation, had no business inquiring into the administration of church funds absent criminal probable cause, thus terminating the Attorney-General's investigation.

Petitioner to the retaliatory misdeeds of Petitioner's fired ex-attorney, Jack Kessler. For Kessler, violating the law and his professional and ethical obligations, including the duty to preserve the confidences and secrets of a former client, retaliated by misrepresenting to both the California Attorney General's office and the Federal Communications Commission that fraud had been perpetrated by Petitioner, offering later to tell the truth to the Respondent to "straighten things out" for Petitioner if Petitioner withdrew its complaint before the state bar. And amazingly, the Respondent never mentioned Kessler, thereafter suspended from the bar, as being the original source for its investigation for fear that discovery thereof would void its proceedings, and instead maintained, and maintains, that the "complaining witnesses" were one Paul Diederich and one Joseph Baumgartner.

In September of 1977, acting allegedly on a complaint received from one Paul Diederich, a former cameraman for the church who was terminated for falsifying time cards, Respondent commenced an investigation of Petitioner. Respondent demanded access to all the church's financial records. The church responded in part to the demands of Respondent, but neither the board nor the congregation could in good conscience comply with the demand for those records which would reveal the identity of its donors in connection with the amounts given to the church and its pastor. The basis for this refusal was grounded and clearly stated in the Christian beliefs of the members of Petitioner and the denomination to which the church belongs. Members of that denomination, the Full Gospel Fellowship of Churches and Ministers, International headquartered in Dallas, Texas and composed of over 2,000 member churches and 2 million adherents, are strictly commanded to give in secret. This is based upon Matthew 6:1-4 which states:

> "Take heed that ye do not your alms before men, to be seen of men: otherwise ye have no reward of your Father which is in heaven. Therefore, when thou doest thine alms, do not sound a trumpet before thee, as the hypocrites do in the synagogues and in the streets, that they may have glory of men. Verily I say unto you, They have their reward. But when thou doest alms, let not thy left hand know what thy right hand doeth: That thine alms may be in secret: and thy Father which seeth in secret himself shall reward thee openly."

Any coerced disclosure of donations therefore directly violated a central tenet of the religious beliefs of the members of Petitioner. Respondent was advised that its demands infringed upon Petitioner's religious freedom, yet continued its demands.

The District of Columbia Circuit, in affirming the Respondent's dismissal of Petitioner's license, relied upon Respondent's representations that there were a number of complaints or charges of fraudulent solicitation necessitating its subsequent investigation of Petitioner. Herein lie the various frauds of the Respondent.

The nature of Respondent's fraud is several-fold. The first component of Respondent's fraud was its concealment of the fact that the real source of the "allegations" resulting in the Respondent's investigation of Petitioner was a fired former attorney for Petitioner, subsequently suspended from the bar for his unethical conduct towards Petitioner. The second was simply the Respondent's representations that prior to its September 19, 1977 demands for donor records, there had been *allegations* of fraud, from *numerous complaints* received by it, or from numerous *complainants* or sources. The third was simply its representations that there were allegations of *fraud* or *fraudulent practices* all prior

to, and justifying, its September 19 demands for donor records. All were exposed by Petitioner's motion to vacate judgment for fraud.[2]

In order to place the actions of Kessler relevant to this first fraud in perspective, Petitioner must briefly recite the retaliatory misdeeds performed by Kessler subsequent to his termination by Petitioner.

While employed by Petitioner, Kessler represented Petitioner in the lawsuit of *Building Material Dealer's Credit Association v. Faith Center, a.k.a. Faith Center, Inc., A Religious Corporation dba Faith Center Global Ministries; Mar-Gard, Inc., A Corporation; et al.*, No. 25-38-17, filed in approximately September of 1976 in Orange County Superior Court in California. Sometime after November 30, 1976, on which date Kessler was fired, Kessler was retained by *Mar-Gard, Inc.* to represent it, an adverse interest, in that *very same lawsuit*. Mar-Gard was owned by Joseph Baumgartner. Motion, "Declaration of Kenneth E. Roberson", at pp. 3-4.

In another matter subsequent to November 30, 1976, Kessler deliberately and willfully withheld certain of Petitioner's legal files and certain word processing equipment for the purpose of securing an amount of money which Petitioner owed him. *Id.*

In still another instance of unethical conduct, on or about April 21, 1977, Kessler represented to a court by declaration that he was *not* counsel of record for the Baumgartners in the case of *Mar-Gard, Inc., A California Corporation, Joseph Baumgartner and Lucille Baumgartner v. Ward Pearce,*

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[2] "Motion to Vacate Judgment pursuant to F.R.C.P. 60(b)(3), 60(b)(6), and for Fraud Upon the Court; Declarations of Kenneth E. Roberson and Edward L. Masry in Support thereof; Memorandum of Points and Authorities in Support thereof", filed May 25, 1983 (hereinafter, Motion).

et al., in the Orange County Superior Court, though in fact he was. *Id.*

The above actions speak volumes concerning Kessler's unethical performance in general and the attitude that he harbored toward Petitioner. In fact, for the above misdeeds the Supreme Court of California *suspended* Kessler from the Bar, and placed him on probation for three years, expiring in January, 1984. (See Motion, Exhibit A, "In The Matter of The Suspension of Jack Leader Kessler. . . .")

However, Petitioner received its most devastating blow from Kessler when he perpetrated the retaliatory scheme hereafter related for which Petitioner will soon lose *all* of its $30,000,000.00 broadcasting licenses.

During the Spring of 1977 Kessler, in retaliation for his firing by Dr. Scott, went to the California Attorney General's Office and the Federal Communications Commission and charged that Petitioner and Dr. Scott had committed various illegal acts and improprieties on the air. In doing so, Kessler was joined by one Joseph Baumgartner. Joseph Baumgartner, who unbeknownst to Dr. Scott had previously been a member of both the SS and an associate of the surgical teams in part responsible for the atrocities in Hitler's Germany (see Motion, Exhibit B, "Deposition of Susanna Footitt", at 21; see also Exhibit C, "Deposition of Joseph Baumgartner", at 109-111) had been fired for embezzlement by Dr. Scott in December of 1976. Baumgartner was already employed at Petitioner when Dr. Scott arrived there in 1975.

Specifically, approximately four months after his firing, Kessler, in March or April of 1977, complained to Warren Abbott of the Attorney General's office both by telephone and letter (see Motion, Exhibit D, "Deposition of Warren J. Abbott", at 4, 8). Following these communications and in response to Mr. Abbott's delegation of the matter to

William S. Abbey, another Deputy Attorney General, the latter also had conversations with Kessler during this same period (see Motion, Exhibit E, "Deposition of William S. Abbey, vol. I, at 5-6). During those conversations, Kessler purported to represent both himself and Joseph Baumgartner. Kessler was also to complain to Abbey in late 1977 (see Motion, Exhibit F, "Deposition of William S. Abbey", vol. II, at 21-22).

Crucially, the representation by Kessler of himself and Baumgartner before these agencies continued his historic pattern of unethical conduct, since even if Kessler's charges concerning Petitioner and Dr. Scott were true, which they were not, said actions constituted cooperative breaches, *e.g.*, of the attorney/client privilege, the duty to preserve the confidences and secrets of a client, and the duty to avoid representing clients adverse to a former client.

Kessler's charges were that: (1) Dr. Scott had transferred money out of Petitioner to bank accounts of another church in San Francisco; (2) Dr. Scott had made misrepresentation in soliciting donations and (3) Dr. Scott had solicited money for various specific projects but that the money had not been used for those projects. These projects included a "fountain of faith" and the purchase of various items of equipment (see Motion, Exhibit E, *supra*, I Abbey at 13-14). *As later discussed, these are the exact charges Respondent was to attribute to Baumgartner.*

Following suits by Dr. Scott for violations of his constitutional rights effected by the Attorney General's investigation, the Attorney General's office declared it would cease its investigation and the subsequent *Petris Bill*, SB 1493 enacted by the California Legislature February 15, 1980, rendered such investigation illegal.

However, during the Attorney General's investigation, Kessler, on his own initiative, went to the Respondent with

these same charges as to his former clients, Petitioner and Dr. Scott, as the following demonstrates.

First, in a recent deposition of Peter Esser, now Attorney General for the Northern Marianas Islands, Esser testified that just prior to Kessler's disciplinary proceedings before the California State Bar, Kessler called Esser, admitting that he, Kessler, had gone to both the Attorney General's Office and the Respondent. Motion, at 6. Second, Esser testified that *Kessler also offered to return to both agencies and negate the charges he had made if Petitioner withdrew the complaint before the bar which ultimately led to his suspension. Id.* Third, Esser stated that Kessler, before the bar, admitted that he had made this offer but retorted that since it was not accepted by Esser, there was no harm done. *Id.* (See also Motion, Exhibit G, "Deposition of Peter Van Name Esser", at 7-10).

Fourth, this matter was brought before the attention of the bar in the very proceeding in which he was suspended. In fact, Exhibit A, *supra*, at paragraphs 25-29, revealed that

> "The State Bar contends, and would, if called upon, submit evidence to establish that during that same telephone conversation, Respondent [Kessler] offered to make a statement which would be contrary to a prior statement he had made to a governmental agency, which prior statement was relevant to certain unrelated government investigations in exchange for the withdrawal of Mr. Henderson's State Bar complaint and/or Mr. Henderson's and Mr. Esser's failure to appear at the investigation hearing."

and Kessler never appealed this finding.

Fifth, on March 23, 1979, the Broadcast Bureau in its "Broadcast Bureau's Response to Motion to Compel Answers" (see Motion, Exhibit H, "Broadcast Bureau's Re-

sponse to Motion to Compel Answers", at 1-2) made it clear that the only complaint was that of Paul Diederich, and Baumgartner's *subsequent* statement was solicited by the Bureau. However, nowhere is it explained where the Bureau even *learned* of Baumgartner. The Bureau learned from Kessler.

Sixth, the "Kessler connection" explains the blatant contradiction between the statements of the Attorney General's office and that of Joel Rosenberg, the investigator for the FCC with whom Kessler initially spoke. In his deposition, Abbey stated that he met with Rosenberg for the first time in *August* of 1977 (see Motion, Exhibit F, *supra*, II Abbey at 34-35). However, Rosenberg stated that it was only in *September*, after September 15 when Rosenberg obtained a statement from Diederich but before September 19 when Rosenberg appeared at Faith Center, that he learned of the Attorney General's investigatory efforts (see Motion, Exhibit I, "Affidavit" of Joel Rosenberg, at 2). This contradiction is explainable only by the facts that had Rosenberg dated his meeting in August, he would have to explain who informed him of the Attorney General's investigation, since then Diederich could not have done so. *However, dating the meeting in late September after a "number of interviews" ignored that the Bureau had already stated that only Baumgartner and Diederich supplied the charges.*

In this regard it should be noted, for example, that while Rosenberg has stated that he "received no documents from the California Attorney General's office relating to their investigation of Faith Center (see Motion, Exhibit I, *supra*, at 5) Abbey's deposition flatly contradicted this, stating that he personally sent same to Rosenberg in response to his personal request (see Motion, Exhibit F, *supra*, II Abbey at 37-40).

Seventh, on April 15, 1983, the deposition of Kessler was taken in the action of *James v. Reverend W. Eugene Scott, Ph.D., W.T. Scott, Faith Center Church, et al.* In it, Kessler flatly admitted that he had gone to the FCC in the Spring of 1977 (see Motion, Exhibit J, "Deposition of Jack Kessler", at 21-22). After this admission, Kessler relied on the bogus talisman that answering "I don't recall" to virtually every question would immunize him from a challenge to his credibility. However, he denied, *e.g.*, recalling facts which were those constituting the *finding* of facts for which he was suspended from the bar, of which facts Kessler would be and is keenly and uniquely aware (compare Motion, Exhibit J, *supra*, at 36-38 with the facts at Exhibit A, *supra*, paragraphs 18-24). Kessler's deposition contained, for example, the following exchange:

> "Q. [By Mr. Masry] Did you have occasion after November of 1976 to have a conversation with any Federal Communications Commission employee?
>
> A. Yes.
>
> Q. Do you recall roughly the month and year this conversation or conversations took place?
>
> A. I would estimate that would have been in the spring of 1977 . . .
>
> Q. So it would have been sometime in March, April or May of 1977; is that correct?
>
> A. That is correct . . .
>
> Q. Do you recall where the conversations took place?
>
> A. In offices. Three or four offices in the FCC building. In an office building in Washington.
>
> Q. Well, you recall that name being brought up? Mr. Rosenberg's name?
>
> A. Yes, I recall the name.
>
> * * *
>
> Q. Prior to the spring of 1977, did you have any

occasion to go to the FCC?

A. Prior to the spring of 1977?

Q. Do you understand my question?

A. Yes, I do.

No, I don't think I was ever there before.

Q. Subsequent to the spring of 1977, did you go to the FCC?

A. Not to my recollection, no.

* * *

Q. In truth and in fact, Mr. Kessler, you went to the FCC in the spring of '77 for the purpose of somehow *sabotaging* Dr. Scott and Faith Center; isn't that correct?

A. *I don't recall.*

Q. By saying you don't recall, you are not denying that as being true; you just don't recall is that correct?

A. *I might have visited Mars*, but I don't recall."

— *Deposition of Jack Kessler*, pages 21-22, 35, 81.

Finally, it is absolutely clear that the FCC cooperated with the Attorney General's office and that the two agencies shared information concerning their respective investigations (see Motion, Exhibit F, *supra*, II Abbey at 48).

The earlier referenced "Broadcast Bureau's Response to Motion to Compel Answers" casts in bronze the fact that the *only* individuals whom the Respondent alleged were the sources for the "allegations" against Petitioner were Diederich and Baumgartner, thus *intentionally concealing and fraudulently suppressing*, both in administrative proceedings and before the D.C. Circuit, Kessler's role in cooperating with Respondent.

In summation, it appears that Kessler called upon the Respondent in the Spring of 1977 to charge Petitioner and Dr. Scott with various improprieties on the air. Having realized that they could not ethically or legally use Kessler as a source for the allegations, the Respondent seized upon

the Diederich complaint as a makeweight device to get to Baumgartner, whom the Respondent then alleged made the allegations in fact made by Kessler. This explains (1) why none of the substantive charges lodged by the Respondent against Petitioner may be found in Diederich's letter, (2) how the Respondent came to *know* of Baumgartner since he wasn't referenced by Diederich, (3) why it was that an investigatory statement was taken from Baumgartner without a preceding complaint from him, and (4) why Kessler's harges, *which are the same as Baumgartner's "later charges"* (see Motion, Exhibit F, *supra*, at 32) are essentially the same as those supposedly justifying the investigation (see Motion, Exhibit K, "Bill of Particulars", at 5). Despite Petitioner's requests for the sources of Respondent's allegations against Petitioner, the Respondent intentionally concealed Kessler's role, both during administrative proceedings and before the District of Columbia Circuit itself.

The D.C. Circuit was not the only victim of the second fraud. This very Court was defrauded by similar representations by the Respondent in the case of *Faith Center, Inc., Petitioner, v. Federal Communications Commission, Respondent*, No. 82-867, October Term, 1982. Therein the Respondent stated in its January 1983 "Brief for the Respondent in Opposition" that

> In 1977 the Federal Communications Commission received *complaints* [plural]. . . . The Commission *thereafter* instituted an informal investigation into Faith's operations . . . at 2 (emphasis added),

and

> The *complaints* [plural] contained allegations. . . . *Id.*, fn. 2 (emphasis added).

The Respondent represented the same to the Ninth Circuit also. In *Scott v. Rosenberg*, 702 F.2d 1263 (9th Cir., 1983), the Ninth Circuit held that a compelling governmental in-

terest in preventing diversion of funds raised for certain church projects justified the interference with Dr. Scott's free exercise rights resulting from the Respondent's demands for his donation records. 702 F.2d at 1275. The factual predicate for the Ninth Circuit's finding of the existence of a compelling governmental interest was the Respondent's assertions that there had been "allegations [plural] of fraud", "fraudulent practices [plural] alleged", and that in addition to and apart from Diederich's alleged complaint, the Respondent had conducted "several interviews" in which it received information to support Diederich's allegations. 702 F.2d at 1272-1275.

Indeed, in its nationwide "News" fact sheet released April 21, 1982, the Respondent falsely stated that

> The FCC began an investigation into Faith Center's operation of KHOF-TV (Channel 30), San Bernardino, California after receiving complaints [regarding solicitations] and that the solicitations included false statements (emphasis added).

The Respondent represented the above to the D.C. Circuit also. For, in *Faith Center, Inc., Appellant v. Federal Communications Commission, Appellee*, Nos. 81-1648 and 81-1649, the judgment in which case Petitioner's motion sought to vacate, the Respondent, in its December 1981 "Brief for Federal Communications Commission", stated that

> . . . [There were] *charges* that the licensee had fraudulently solicited . . . at 1 (emphasis added),

that

> . . . [There were] *charges* that a broadcast station licensed to a religious organization had been used for the purpose of *fraudulently soliciting* funds from the public. at 2 (emphasis added),

and, signficantly, that

> In 1977, the FCC instituted an information investigation into Faith's operation of KHOF-TV *after* the agency received a *number of complaints*. . . . at 4 (emphasis added).

Nor was the D.C. Circuit the only victim of the third fraud, namely, that there were allegations of fraud or fraudulent practices. The above quotations evidencing the Respondent's misrepresentations with respect to the *number* of complaints also evidence that the Respondent claimed that those complaints were of *fraud*.

The motion to vacate judgment for fraud[3] upon the D.C. Circuit indisputably showed (1) that the Respondent had received, not "numerous complaints" but a *single* complaint from Diederich, and (2) that that complaint did not allege fraud. The Petitioner's motion further proved that (3) no other complainants existed prior to September 19; (4) that *after* its September 19 demands, Respondent did not receive further complaints but instead *solicited* statements from but a single interviewee whom it sought out; and (5) that that interviewee, Joseph Baumgartner, fired from Faith Center for embezzlement, *denied* under oath that he ever accused Petitioner of fraud.

Specifically, despite substantial resistance, the Respondent was forced to reveal the sources for its statements that there were numerous allegations, etc., made against Petitioner. In its "Broadcast Bureau's Response to Motion to

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[3]See "Supplement to Motion to Vacate Judgment Pursuant to F.R.C.P. 60(b)(3), 60(b)(6), and for Fraud Upon the Court; Declaration of Kenneth E. Roberson and Edward L. Masry in Support Thereof; Memorandum of Points and Authorities in Support Thereof" filed June 1, 1983; see also "Motion to Vacate Judgment Pursuant to F.R.C.P. 60(b)(3), 60(b)(6) and for Fraud Upon the Court; Declaration of Kenneth E. Roberson and Edward L. Masry in Support Thereof", filed March 9, 1983, referenced in Petitioner's May 25, 1983 Motion and identified by Respondent as substantially identical to Petitioner's May 25, 1983 Motion.

Compel Answers", dated March 23, 1979 in hearing proceedings involving the church's KHOF-TV license, *the Respondent's sole sources were quoted as being*

> . . . statement of Joseph Baumgartner dated September 20, 1977 (. . .) Letter of Paul Diederich dated August 8, 1977; statement of Diederich dated September 15, 1977.

With the benefit of the above, then it is clear that *prior* to the September 19 investigation, there was but *one* complaint from but *one* complainant, the August 8, 1977 letter from Diederich. The later September 15 statement of Diederich was a follow-up statement taken by the Respondent after this complaint. Moreover, the later September 20 statement was not a complaint, but a statement solicited by Respondent, and again, it was solicited after the demand for donor records. These facts flatly contradicted the earlier position of Respondent that there were, prior to its demands for Petitioner's records, "charges" or a "number of complaints" of fraud.

Diederich's letter did not allege fraud. For example, in *Scott v. Rosenberg, supra*, U.S. Magistrate Ralph J. Geffen, after having specifically reviewed that letter, explicitly declared that it did not allege either fraud or fraudulent practices as having occurred. In fact, a cursory reading of the letter revealed that "fraud" or "fraudulent practices" were *nowhere to be found.*

Moreover, Diederich had himself under oath testified that (1) although certain specific projects had not been completed prior to his firing in January of 1977, he had no knowledge as to whether Petitioner subsequently completed them, (2) he had no knowledge or reason to believe that Dr. Scott had misused Petitioner's broadcast license for monetary or

personal gain,[4] and (3) he had no information, knowledge, or belief that Petitioner had defrauded its listening audience.[5] And, Diederich further testified that he did not believe, *or allege in his August 1977 letter*, that fraud had occurred, and testified that after having worked for over a year with Dr. Scott, he had never seen him do a dishonest act. Finally, Diederich himself cross-complained against the Respondent for its misrepresenting him as accusing Petitioner of fraud, and filed an amicus brief before this Court in support of Petitioner's attempt to obtain its license back after its fraudulent dismissal.

Turning to Mr. Baumgartner's statement of September 20, for reasons above stated it could not have been relied upon as having occurred prior to the Respondent's demands for donor records. Petitioner demonstrated that Baumgartner denied ever having accused Petitioner of fraud.[6]

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[4]*Faith Center, Inc. v. Federal Communications Commission*, Nos. 81-1648 and 81-1649, D.C. Circuit, *supra*, Transcript of Paul Diederich, October 10, 1979, at 86-87, 96-97; 9 Joint Appendix 2150-2151, 2160-2161. This case produced the April 7, 1982 judgment cited at 1, *supra*.

[5]*Id.*, Jt. App. 2160.

[6]Despite Respondent resistance, the deposition of Joseph Baumgartner was ultimately taken. See "Transcript of Deposition of Joseph Baumgartner, October 10, 1979" on file in *Faith Center, Inc.*, D.C. Circuit, *supra*. Mr. Baumgartner made it absolutely clear in said deposition that the Respondent's investigators had *sought* him out to obtain a statement (Trans., pp. 7, 8, 12; 9 Joint Appendix 2178, 2179, 2183), that he had not told its investigators that monies collected for specific purposes had not been expended in the manner specified (Trans., p. 7; 98 Jt. App. 2178), that while most of the funds had not been used prior to his termination, he had been unable to tell the investigators whether or how the funds had been used in intervening months (Trans., pp. 8, 12-16; 9 Jt. App. 2179, 2183-2187), and that he knew of no actions taken by Petitioner with the intention of defrauding its listeners (Trans., p. 117; 9 Jt. App. 2287).

REASONS FOR GRANTING THE WRIT.

I.
Introduction.

The present case involves more than simply an attempt to redress the grievous assault by members of an administrative agency upon the religious freedoms of a church whose members give in secret according to religious conviction. The grief of Petitioner is understood only by recitation of the following.

The role of the federal government in securing the long overdue enjoyment by minorities of their federal civil rights stands in stark and ironic contrast to the treatment afforded to date by much of the same government in vindicating Petitioner's religious freedoms. For, by way of oversimplification, said government transcended anti-black animus which created barriers between men to the securing of those unalienable liberties with which they as equals were endowed by their Creator, the federal government willing to respond to the cries of leading churchmen in the ordering of state/individual relationships. Yet, the same federal government has yet been unwilling to acknowledge a far more malignant cancer creating a barrier between God and man in the exercise of that paramount liberty to worship his Creator, when those same cries would affect the ordering of federal/individual relationships.

The cancer that cries for cure is the modern disrespect for the church and churchmen, a symptom of which is the nearly irrebuttable presumption of immorality that attaches to either when accused, however spuriously or spitefully, of wrongdoing. Whether Hollywood's Elmer Gantry is a cause or symptom of this presumptive bias, holding all the church world accountable for bad eggs like a Communist Jim Jones that exist in any field of endeavor is akin only

to making Jesus responsible for Judas's choice, or, for that matter, holding all federal employees morally responsible for Watergate. And, ironically, as is the nature of those harboring the most deep-seated biases, those the quickest to claim immunity are those likely to be affected the most.

It follows, then, that when some government officials (who often have greater ease accepting a view of preachers and churchmen as meek and bespectacled instead of like the Christ who, if he did today what he did centuries ago in the temple, would be arrested for assault with a deadly weapon) encounter Constitution-respecting churchmen fearlessly asserting constitutional rights that by their nature are assertable only in conflicts with government, said bias will often result in the imputation to the claimant of ulterior motives and a counting of his civil rights as something to be circumvented. Nowhere has the snide assurance that this malignancy will go unchecked found better expression than in the Respondent fraudulently concealing its illegal and unethical "source" for its allegations, and in its fraudulently proffering to the D.C. Circuit that there were numerous allegations of fraud supporting their investigation demands.

This case is not simply one seeking reversal of a decision involving egregious factual error. It seeks a remedy to the active fraud perpetrated by federal administrative officials. Thus, this case is extremely important, as it involves the question of whether federal administrative officials may go so far as to effect the violation of Petitioner's rights by perpetrating a fraud upon a court over which this Honorable Court has supervisory power. Additionally, important issues are whether the actions of the Respondent violated due process and/or Petitioner's freedoms under the Religion clauses.

II.

The Respondent's Actions Constituted Fraud Upon the Court and Misconduct by an Adverse Party.

The fact that federal courts possess inherent power to review judgments obtained by fraud is settled. *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944); *Universal Oil Products Co. v. Root Refining Co.*, 327 U.S. 575 (1946), *remand* 169 F.2d 514 (3rd Cir., 1948) *cert. den'd., sub nom. Universal Oil Products Co. v. William Whitman Co.*, 335 U.S. 912 (1949). In fact, in *Hazel*, this Court vacated a *fourteen*-year-old judgment rendered by the Third Circuit pursuant to the inherent power of that court to review fraud. And, significantly, there is no limitation period within which courts must review fraud.

Under Federal Rule of Civil Procedure 60(b) (see App. E) upon motion a court may relieve a party from a judgment for fraud, misrepresentation, or other misconduct of an adverse party, 60(b)(3), and for any other reason justifying relief, 60(b)(6). And, under *Yanow v. Weyerhauser SS Co.*, 274 F.2d 274, 277-278 (9th Cir., 1959), *cert den'd.*, 362 U.S. 919, the Ninth Circuit held that F.R.Civ.P. 60(b) was applicable to appellate proceedings.

Case law has long recognized the sacred importance of the relationship between the attorney and client. In the case of *People ex rel. Lawyers' Institute of San Diego v. Merchants' Protective Corporation*, 189 Cal. 531, 209 P. 363 (1922), for example, the California Supreme Court declared that

> The essential element underlying the relation of attorney and client is that of trust and confidence of the highest degree growing out of the employment and entering into the performance of every duty which the attorney owes to his client in the course of such employment. It is the existence of this relation which has

> called into being the various statutory regulations governing the admission of attorneys and counselors at law and which embody certain requirements of character, integrity, and learning as the prerequisites of said admission to the right and privilege of practicing law. It is the possession or reputation for the possession of these personal qualifications which constitutes, as a rule, the main inducement of the personal and confidential relation of attorney and client.

Cf. *In Re Danford*, 157 Cal. 425, 108 P. 322 (1910) ["the relation between attorney and client is a fiduciary one of the very highest character, and binds the attorney to the most conscientious fidelity, precluding the abusing thereof"].

As part of the "various statutory regulations", Section 6068(e) of the California Business and Professions Code provides that "It is the duty of an attorney . . . to maintain inviolate the confidence, and *at every peril to himself* to preserve the secrets, of his client. This duty is owed to clients and former clients violation of which is both punishable by contempt[7] and a ground for suspension or disbarment.[8]

Disciplinary Rule 4-101(B) of the American Bar Association's *Model Code of Professional Responsibility*, App. E, pp. 70-72 prohibits an attorney from revealing a confidence or secret of his client. "Confidence" refers to information protected by the attorney-client privilege, while "secret" refers to other information disclosure of which would be embarrassing or would be likely to be detrimental to the client.[9]

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[7]California Code of Civil Procedure, §1209.

[8]California Business and Professions Code, §6103.

[9]The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information. . . . ABA, *Model Code*, *supra*, Ethical Consideration 4-4.

It is clear that Kessler's conduct in his representations to the Respondent violated the above statute and professional ethical obligations. Moreover, Rule 4-101 of the Rules of Professional Conduct of the State Bar of California, App. E, p. 72, (effective January 1, 1975), clearly states, in relevant part, that an attorney cannot accept employment adverse to a former client relating to a matter in reference to which he has obtained confidential information by reason, or in the course, of his employment by such former client. Said rule implements §6068, *supra*. *In the matter of Charles Willie L.*, 63 Cal.App.3d 760, 132 Cal.Rptr. 840 (1976). Again inasmuch as Kessler purported to represent himself and *Joseph Baumgartner* before the Respondent, clearly Rule 4-101 was violated also. Surely the Respondent's actions, in *knowingly entertaining and accepting* Kessler's representations and in its subsequent *concealment and suppression* during administrative proceedings and before the D.C. Circuit of his being a "source", constituted misconduct and fraud within the meaning of F.R. Civ. P. 60(b) and the inherent power of a court to review fraud.

Moreover, it is clear from the earlier recited facts that other frauds were committed upon the D.C. Circuit. The facts are (1) *prior* to the Respondent's demands for Petitioner's donor records, there was but a *single* complaint letter, not numerous "allegations", (2) both U.S. Magistrate Geffen and the so-called complainant denied that the complaint complained of fraud, (3) the Respondent admits that it was it who later characterized Diederich's complaint as one of fraud, and (4) that "fraud" and/or "fraudulent practices" were *nowhere* to be found in his letter. Further, the fact is Baumgartner denied accusing Petitioner of fraud, all of which facts clearly render Respondent's representations to the D.C. Circuit to the contrary fraudulent.

III.

The Respondent's Fraud and Misconduct Violated Due Process and Warrant Exercise of Supervisory Power.

It is settled that where conduct by federal officials is fundamentally unfair, the "fair play" component of federal due process applies to correct the injustice. *E.g., Alcorta v. Texas*, 355 U.S. 28 (1957) [knowing use of false testimony by government prosecutor]. See generally, *Galvan v. Press*, 347 U.S. 522 (1954); *Pinedo v. U.S.*, 347 F.2d 142 (9th Cir., 1965) [determination whether due process demands are met requires decision as to whether, upon the whole course of proceedings, and in all the attending circumstances, there was a denial of fundamental fairness].

Surely the receipt by the Respondent of allegations prejudicial to Petitioner from Kessler, with knowledge of the former attorney-client relationship between Kessler and Petitioner, evinces such a cooperation in the violation of laws and professional ethical responsibilities as to violate due process. Further, Petitioner's demonstration that Respondent intentionally concealed Kessler's role in its investigation not only corroborates the fact of said cooperation, but constitutes an independent due process violation. Cf. *Brady v. Maryland*, 373 U.S. 83 (1963). Moreover, exercise by this Court of its power to supervise the administration of appellate justice under S. Ct. Rule 17(a) is warranted.

IV.

The Respondent's Fraud and Misconduct Violated Petitioner's Donors' Free Exercise Rights.

The government may restrict religiously motivated action only if a "compelling state interest" is served. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). ". . . [O]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitations . . ." *Id.* The government must also

show that no alternative means exists that would achieve its end without infringing First Amendment rights. *Id.* at 407.

It is of course clear that the free exercise rights of contributors to Petitioner were interfered with by the Respondent's numerous demands for Petitioner's donor records,[10] necessitating the existence of a compelling governmental interest. The fraud and misconduct of the Respondent above-referenced taints the entire investigation of Petitioner, including the inquiry into Petitioner's donor records, and also conclusively demonstrates the absence of any factual predicate for the finding of a compelling governmental interest.

Conclusion.

For each of the above reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

KENNETH E. ROBERSON,
(Counsel of Record),
Attorney for Petitioner,
Faith Center, Inc.

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[10]Unheeded free exercise objections were raised by Petitioner throughout administrative proceedings. 1 Jt. App. 50, 112-113, 119-120, 125-126, 232-237; see also 5 Jt. App. 1270; 1 Jt. App. 279, 295, 1336-37; 2 Jt. App. 327C, D, G, H, Q, 352; 3 Jt. App. 578-579, 582-583; Opposition to Broadcast Bureau's Motion to Compel at 7 (filed November 9, 1979); 3 Jt. App. 673-679, 713-714, 738-740.

APPENDIX A.

Order.

United States Court of Appeals for the District of Columbia Circuit.

No. 81-1648, September Term, 1982.

Faith Center, Inc., Appellant v. Federal Communications Commission, Appellee And Consolidated Case No. 81-1649.

Filed: July 13, 1983.

BEFORE: Wright, Wilkey and Wald, Circuit Judges.

ORDER

Upon consideration of appellant's lodged motion for stay pending review, of appellant's lodged motion to vacate judgment pursuant to F.R.C.P. 60(b)(3), 60(b)(6), and for fraud upon the Court, of appellant's lodged supplement to motion to vacate judgment, and of the lodged letter from counsel for appellee dated June 1, 1983, it is

ORDERED, by the Court, that the Clerk is directed to file each of the aforementioned documents and to enter same on the Court's dockets; and, it is

FURTHER ORDERED, by the Court, that appellant's motions for stay pending review and to vacate judgment are denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher

GEORGE A. FISHER

Clerk

APPENDIX B.

Judgment.

United States Court of Appeals for the District of Columbia Circuit.

September Term, 1981.

Faith Center, Inc., Appellant, v. Federal Communications Commission. No. 81-1648 & No. 81-1649. FCC 81-235.

Filed: April 7, 1982.

Appeals from Orders of the Federal Communications Commission. Before WRIGHT, WILKEY, and WALD, Circuit Judges.

These causes came on to be heard on appeal from the Federal Communications Commission and were briefed and argued by counsel. The issues presented have been accorded full consideration by the court; they occasion no need for an opinion. *See* Local Rule 13(c).

This court is in agreement with the result reached by the Commission, generally for the reasons given by it in *Faith Center, Inc.*, 82 FCC2d 1 (1980), *reconsideration denied*, FCC 81-235 (1981) (Joint Appendix 1333, 1925). *See United States v. Lee*, ... U.S. ..., ..., 50 U.S.L.W. 4201, 4204 (Feb. 23, 1982); *King's Garden, Inc. v. FCC*, 498 F.2d 51, 60 (D.C. Cir. 1974). *See also Faith Center, Inc.*, 69 FCC2d 1123, 1126-1127 (1978) (JA 49, 52-53) (FCC's "By Direction" Letter of June 15, 1978); *cf. Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981). We find no abuse of discretion or procedural default.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the orders of the Federal Communications Commission appealed from in these causes are hereby affirmed.

Per Curiam
For the Court
/s/ George A. Fisher
George A. Fisher
Clerk

APPENDIX C.

Memorandum Opinion and Order.

Appeal, From Initial Decision, Sustained
Licensee, Effect of Misconduct
Renewal, of License, Denied or Dismissed

Commission sustains ALJ's order dismissing broadcaster's renewal application and denies petition for special relief. Licensee did not participate in discovery phase in good faith and consistently failed to answer interrogatories and failed to produce documents. BC 78-326

FCC 80-602

Before the Federal Communications Commission, Washington, D.C. 20554.

In re Application of Faith Center, Inc. Station KHOF-TV San Bernardino, California. BC Docket No. 78-326. File No. BRCT-746.

For Renewal of License,

(Adopted: October 9, 1980; Released: November 14, 1980)

By the Commission: Commissioner Jones absent.

I. Background

1. Faith Center, Inc. (Faith) appeals from an order of Administrative Law Judge Edward Luton dismissing Faith's application for renewal of its license to operate station KHOF-TV, Channel 30, San Bernardino, California.[1] Also before the Commission for consideration of Faith's petition for special relief, filed February 29, 1980, proposing a

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[1] FCC 80M-459, released March 7, 1980. Faith filed its appeal May 7, 1980, the Broadcast Bureau filed an opposition on June 12, Faith replied on July 21, the Broadcast Bureau commented on the reply August 22, and Faith and TELACU filed further comments on September 17.

"distress sale" of KHOF-TV and two co-owned stations, KVOF-TV, Channel 38, San Francisco, California, and WHCT-TV, Channel 18, Hartford, Connecticut.[2] The parent corporation of the proposed minority purchasers, The East Los Angeles Community Union (TELACU), on May 7, 1980, appealed the dismissal order and simultaneously renewed an earlier motion to intervene in these proceedings.[3]

2. Faith is as a nondenominational Christian Church founded in 1947 and headquartered in Glendale, California. Faith and an affiliated church also involved in these proceedings, Wescott Christian Center (Wescott), are members of the Full Gospel Fellowship of Churches International. Dr. W. Eugene Scott serves as the president and pastor of Faith and Wescott and the president of th Full Gospel Fellowship. Faith received licenses to operate KHOF-FM in 1957 and KHOF-TV in 1972. Faith acquired WHCT-TV in 1972 and KVOF-TV in 1973.

3. By Order and Notice of Apparent Liability, FCC 78-674, released October 11, 1978, the Commission designated Faith's renewal application for hearing. Four issues were designated:

(a) To determine all the facts and circumstances surrounding Faith Center, Inc.'s failure to permit Commission access to certain licensee books, records and employees.

(b) To determine whether Faith Center, Inc., failed to submit information requested by the Commission in the Commission's letter dated June 15, 1978.

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[2]Supplements to the petition were filed March 3, March 21, and April 29. The Broadcast Bureau filed statements March 11, May 9, and July 10 to which Faith and TELACU responded July 22. Assignment applications covering the three stations were filed April 25.

[3]TELACU originally addressed a motion for leave to intervene to the Presiding Judge on March 13, 1980.

(c) To determine whether in its over-the-air fund-raising broadcasts, Faith Center, Inc., violated, or is in violation of, Title 18, United States Code Section 1343.[4]

(d) To determine, in light of the evidence adduced under the preceding issues, whether the applicant possesses the requisite qualifications to be or to remain a licensee of the Commission, and whether a grant of a captioned application would serve the public interest, convenience and necessity."

The order also served as a notice of apparent liability in the amount of up to $20,000.

4. Pursuant to the designation order, the Broadcast Bureau, on November 9, 1978, filed a bill of particulars. The bill of particulars recites that on September 19, 1977, Commission investigators visited the licensee's offices in Glendale, California, and informed the licensee's personnel that they were investigating allegations that KHOF-TV had been used to solicit funds for specific purposes and that the funds collected were not expended as indicated in the over-the-air solicitations. The investigators requested the licensee to provide accounts receivable ledgers, lists of solicitations and monies received and records of money spent on each project for which funds were solicited, and asked to interview bookkeeping personnel. These requests were refused. In an October 31, 1977 letter, the Commission, specifically, the Broadcast Bureau's Complaints and Compliance Divi-

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[4] "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 U.S.C. §1343 (1977).

sion, requested Faith to submit copies of cash receipts and disbursements journals, a list of projects for which funds were solicited, a list of expenditures made on these projects, a list of former station employees, a list of Dr. Scott's own pledges and contributions to Faith, a statement of the dates of solicitations made by Dr. Scott, a statement of what representations were made as to how the money raised would be spent, a statement of how much money was received or pledged in response thereto, the period of time in which the money was received, a list of people making contributions or pledges, and a statement that licensee employees would be available for interviews. Faith did not submit the requested information. Finally, by two letters, Commission staff requested Faith to make available videotapes of its "Festival of Faith" program on which solicitations of funds were made. Faith initially replied that to do so would be burdensome and expensive, but later replied that any existing tapes were the property of its sister church, Wescott. These facts formed the basis of issue (a).

5. Issue (b) relates to a letter by the Commission[5] to Faith rejecting Faith's constitutional arguments and requesting the licensee to submit the information previously requested with some modifications.[6] Faith failed to submit all of the information requested, including the cash receipts and disbursement journals, specific evidence that expenditures for the various projects were ever made, and a list of pledges and contributions of Dr. Scott.

6. Issue (c) arises from allegations received by the Commission in August 1977 concerning Faith's fundraising

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[5]By direction of the full Commission. FCC 78-434, released June 15, 1978, 69 FCC 2d 1123 (1978).

[6]At this point the Commission no longer requested Faith to submit the names of all persons pledging or contributing funds.

practices. These allegations were that Faith had raised money for specific projects which were never carried out. The allegations concerned fundraising appeals for audio equipment, studio lights, roof repairs, and a "fountain of faith". It was also alleged that Dr. Scott had used money raised through over the air fund solicitation for his own use by giving it to other organizations, primarily Wescott and the Sunset Mausoleum, in which he had interests, and that fundraising appeals were accompanied by false statements that Dr. Scott contributed his own funds and that he received only $1.00 a year from the church.

7. Two aspects of the procedural history of this case are central to the matters now before the Commission. These are Faith's response to the Broadcast Bureau's discovery attempts and Faith's request for distress sale relief. At a prehearing conference on December 13, 1978, the presiding judge Daniel Head set a hearing date of March 20, 1979 and directed Faith to respond by January 15, 1979, to interrogatories and a motion for the production of documents filed December 8, 1978 by the Broadcast Bureau.[7]

8. These dates were modified at a second prehearing conference, January 19, 1979, the hearing date extended to June 26, 1979, and the response date extended to February 1, 1979.[8] Moreover, the presiding judge noted that on January 10, 1979 Faith had declared in a letter that it was considering the possibility of a distress sale. The letter stated that Faith would inform the ALJ of its distress sale election by February 27, 1979.[9] The ALJ indicated that time was

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[7]FCC 78M-1896, released December 20, 1978.

[8]FCC 79M-123, released January 24, 1979.

[9]Faith represented in the letter: "Assuming that the hearing is not continued on other grounds . . . or that a request for such continuance is not pending, the licensee will undertake to advise the Commission on or before February 27, 1979, whether it intends to seek out a minority purchaser."

being extended to June 26 as an accommodation to Faith and that if Faith waited until May or June to seek distress sale relief he would take into account the time extended in assessing any such request.[10]

9. Thereafter, on February 1, 1979 Faith responded to the Bureau's discovery requests, but the Bureau found these responses inadequate in several respects and filed a motion to compel on March 2, 1979. The ALJ granted the Bureau's motion insofar as it sought information concerning the amounts of money donated that were actually dedicated or extended for the projects for which they were donated and the dates of such expenditures. He also found that Faith had not provided information about the amounts of funds spent for Dr. Scott's personal use or the dates of such expenditures. Finally, the ALJ found that Faith had refused to answer interrogatories on constitutional grounds which had been rejected at the prehearing conference.[11]

10. Faith sought to appeal the ALJ's orders to the Commission, but the ALJ declined to grant Faith leave to appeal.[12] Faith also filed an appeal and requested a stay before the Court of Appeals. There Faith argued that in the absence of properly filed charges, the Bureau's discovery requests constitute an unreasonable search and seizure in violation of the Fourth Amendment. It argued further that the requests violated the Church's First Amendment rights and would

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[10]See Tr. 86. Faith's statements of its intentions at this point and the presiding judge's directives are disputed. *See* paras. 75 *et seq.*, *infra*.

[11]FCC 79M-456, released April 9, 1979. FCC 79M-470, released April 11, 1979.

[12]FCC 79M-584, released May 11, 1979. In so doing the ALJ concluded that the appeal of the discovery requests did not present any new or novel question of law that would require remand and that since Faith's right to press its constitutional claims is retained, it did not seem likely that a remand would be required even if there were errors in the discovery requests.

mission ever consider the existence or scope of the free exercise interests of Faith Center donors in not having their identity and the details of their contributions revealed.[10] This omission occurred even though the donor identity issue had been raised from the beginning of the case — prior to the June 15, 1978 By Direction letter — and continuously thereafter throughout the discovery proceedings. The absence of any consideration of this critical issue is perhaps explicable due to the Commission's erroneous belief that the By Direction letter had removed this issue from the case, *see id.* at 8. This conclusion was unquestionably mistaken since, as even the Bureau admitted, *e.g.*, 1 Jt. App. 233 n.2, both sets of interrogatories unquestionably required disclosing the identity of donors.[11]

In sum, the Commission dismissed the renewal proceedings based on its finding of petitioner's bad faith in the discovery process. This finding was largely predicated on petitioner's refusal to reveal the identity of its donors after the July 13 dismissal of its interlocutory appeal on jurisdictional grounds.

The United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the Commission

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"while open to question from a purely secular point of view — if indeed open to question at all — was nevertheless protected by the First Amendment" because of its theology was also a defense that could properly have been presented at the hearing, but not at the discovery stage. App. 36.

[10]The Commission noted that in some contexts the first amendment protects membership records from disclosure. However, this observation was made in the course of rejecting Dr. Scott's free exercise arguments on the ground that this principle does not generally extend to an organization's officials. App. 37 n.63.

[11]Faith Center thereafter petitioned the Commission for rehearing on December 3, 1980, asserting that among other errors, the Commission erred as a matter of law in concluding that the Court of Appeals' July 13, 1979 summary dismissal put petitioner on notice that its constitutional claims were invalid. Petitioner pointed out that since the dismissal was indisputedly based on lack of jurisdiction, the Court of Appeals had no authority to, and therefore could not have, considered the merits of the appeal. 6 Jt. App. 1373, 1386. The petition for rehearing was denied on May 12, 1981, without any consideration of the donor disclosure issue or discussion of this blatant misinterpretation of the July 13 dismissal. App. 76-78. Petitioner thereafter timely noticed its appeal to the Court of Appeals.

13. On July 30, 1979 the Bureau filed a motion to dismiss Faith's renewal application because of Faith's repeated failure to comply with discovery Orders.

14. On August 17, 1979 Faith filed responses to the Bureau's interrogatories as mandated by the ALJ. However, the Bureau still found Faith responses inadequate and so indicated on August 22, 1979, in a request for ruling on its previous motion to dismiss.[15]

15. On October 1, 1979, the Bureau filed its second set of interrogatories and a motion for production of documents. Generally described, these interrogatories sought information about the identity of programs during which solicitations were made, financial records concerning fundraising projects, funds used for specific projects, segregation of solicited funds from other funds, financial records pertaining to Faith in Wescott's possession, the identity and responsibilities of the officers and directors of Faith, the existence and location of "Festival of Faith" program tapes and the expenses and contributions of Dr. Scott. Faith objected to all of the interrogatories as unduly burdensome both in terms of quantity and timeliness, all of the interrogatories as defective in form, all of the document production as premature,

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his own funds; (4) set forth the date of each such representation, the amount pledged and the project or cause for which the money was pledged; (5) state the statuts of each pledge identified, including dates of satisfaction and amounts, pledges withdrawn and pledges presently outstanding and the amounts of the balances; and (6) state in detail how monies received as a result of each of the pledges was expended. Additionally, he ordered that Faith produce videotapes of Dr. Scott's program "Festival of Faith" during the period September 1976 through and including November 1976. (These latter items had been called for in three Memoranda Opinion and Order, released April 11, May 11 and July 6, 1979).

[15]While the presiding judge did not order further discovery in response to the Broadcast Bureau's first round of interrogatories and document requests he indicated in later orders that he was still not fully satisfied with Faith's responses. FCC 79M-1466, December 4, 1979; FCC 80M-459, released March 11, 1980.

certain interrogatories as irrelevant and not calculated to lead to the discovery of admissible evidence, two interrogatories on the grounds the information sought could have been requested long ago and one interrogatory as constituting an abuse of the discovery process.

16. On October 30, 1979 Faith sought a continuance to negotiate a distress sale, an election it had previously undertaken to make by February 27, 1979.[16] The ALJ denied the continuance on November 13 because of Faith's failure to pursue distress sale relief earlier in the proceeding as it had indicated it would. Since considerable Commission resources had already been expended and, since the hearing was imminent, the ALJ deemed Faith's motion untimely, indicating that the Commission's distress sale policy did not contemplate an "on again off again approach."[17]

17. On December 4, 1979, the ALJ rejected Faith's objection to the Bureau's second set of interrogatories and document requests and directed Faith to respond within two weeks.[18] In his Order the ALJ observed that Faith had failed to comply with previous discovery orders and warned that if Faith failed to comply strictly with the present order, he would seriously consider granting the Bureau's motion to dismiss Faith's application. With respect to the Bureau's second set of interrogatories, the ALJ noted that Faith had not answered a single interrogatory and that Faith's objections consisted largely of generalized complaints.

18. On December 13 Faith filed an appeal of the ALJ's Order and asked the Commission to stay the deadline for Faith's discovery response pending disposition of the appeal. On December 18, Faith filed additional responses to

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[16]*See* note 9, *supra*.

[17]FCC 79M-1346, released November 13, 1979.

[18]FCC 79M-1466, released December 4, 1979.

the Bureau's second set of interrogatories. On December 28, the Commission, by FCC 79-875, denied Faith's stay motion on the grounds that Faith had not shown that it would be irreparably harmed if the stay were denied.

19. On January 14, 1980, Faith again notified the ALJ of its election to pursue a distress sale and requested a continuance on this basis. On January 17, the ALJ ordered Faith to supplement its responses to the Bureau's third set of interrogatories, served on November 26, 1979 and initially responded to December 10, 1979, by February 1, 1980. Faith filed a response by that date, and on February 7 the ALJ set the hearing for April 1, 1980.

20. On February 29 Faith filed a petition for special relief proposing a distress sale not only of KHOF-TV but also of co-owned stations KVOF-TV San Francisco, California, and WHCT-TV Hartford, Connecticut, to subsidiaries of The East Los Angeles Community Union (TELACU), a hispanic controlled organization. The presiding judge refused to hold the proceedings in abeyance because he concluded that the distress sale request was untimely and because of the imminence of the hearing.[19] He further indicated that Faith had had "plenty of time to pursue the distress sale long ago" and "made an apparent election not to do so."

21. The presiding judge then dismissed Faith's renewal application for failure to prosecute and terminated the proceeding. In so doing the ALJ reviewed the course of the discovery proceedings and found a pattern of inadequate "piecemeal, partial and minimal" discovery on Faith's part. This had occurred, concluded the ALJ, notwithstanding

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[19]FCC 80M-426, released March 12, 1980. A motion filed by TELACU on March 13, 1980 also asking that the proceedings be held in abeyance has not been acted on.

numerous discovery orders mandating strict compliance and granting several extensions of time. An examination of several of Faith's responses to interrogatories convinced the ALJ that Faith's answers were contrived to avoid full and candid disclosure to the Commission, and represented a studied effort to avoid producing any information which could be at all harmful to its case. In view of this bad faith, and Faith's failure to comply strictly with the latest discovery order, the ALJ concluded that Faith's renewal application should be dismissed with prejudice and the proceedings terminated.

22. Faith's appeal alleges several grounds for reversal of the ALJ's dismissal. These are in the order we shall consider them: (1) the designation order and bill of particulars below did not comply with §309(e) of the Communications Act; (2) the designation of issues (a) and (b) violated the "Wiley Guidelines"; (3) the solicitations at issue are protected from government scrutiny by the First Amendment and Faith was entitled to a ruling on all of its constitutional claims during discovery; (4) Faith substantially complied with discovery; (5) the Broadcast Bureau's conduct denied Faith due process; and (6) the dismissal abrogated the Commission's distress sale policy. TELACU's appeal makes essentially the same arguments as Faith does with respect to the Commission's distress sale policy. For the reasons discussed below, we believe that none of the grounds advanced warrant reversal of the ALJ's dismissal of Faith's application for failure to prosecute its application during the discovery phase of this proceeding, and that its request or distress sale relief for station KHOF-TV should be denied.

II. Designation Order and Bill of Particulars

23. Faith claims that the designation order and bill of particulars in this case do not comply with the notice requirements of §309(e) of the Communications Act.[20] Noting that the statute requires the Commission to notify the applicant for renewal "specifying with particularity the matters and things in issue," Faith alleges that the bill of particulars here is defective in two respects. First, Faith charges that the bill omits reference to materials favorable to Faith submitted by it to the Commission during the informal predesignation process. Because the bill of particulars does not discuss all information purportedly before the Commission, Faith alleges that the bill impermissibly broadens rather than narrows the issues, citing the designation Order in *Patrick Henry*, BC Docket No. 78-332.[21] As a related matter, Faith claims that defects in the bill of particulars were compounded during discovery because the ALJ restricted Faith's attempts to acquire from the Broadcast Bureau information underlying the allegations against Faith. Second, Faith maintains that the bill fails to state allegations sufficient to charge a violation of 18 U.S.C. §1343. According to Faith, the bill fails to state the nature of the alleged misrepresentations, that the purpose of the alleged scheme was to defraud, and the precise factual questions requiring resolution. Faith also claims that evidence submitted by Faith during discovery establishes that the charges against it are untrue.

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[20] "[The Commission] shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant . . . of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally." §309(e) of the Communications Act of 1934 as amended, 47 U.S.C. §309(e) (1977).

[21] FCC 78-718, released November 3, 1978, 43 Fed. Reg. 52054 (November 8, 1978).

In particular, asserts Faith, depositions by Paul Diederich and Joseph Baumgartner, whose allegations form the basis of issue (c), retreated from these allegations during the course of deposition testimony and that other documentation further undercuts their original allegations. Faith also suggests that rather than designating Faith's license for hearing, the Commission should have referred the case to the Justice Department for possible criminal prosecution.

24. The Broadcast Bureau replies that the alleged defects in the bill of particulars are irrelevant to Faith's appeal of the dismissal of its renewal application and that there is no necessity for the bill to consider all predesignation materials. In any event, the Bureau submits, by failing to disclose pertinent information to the Commission, Faith also has raised a substantial question about its qualifications which the Commission is obligated to consider. The Bureau asserts that the bill of particulars alleges facts constituting a violation of the fraud statute with sufficient particularity.

25. Aside from the fact that it is unclear how Faith's arguments concerning the bill of particulars relate to the ALJ's dismissal of its application, we do not believe that Bureau's failure to discuss Faith's allegedly exculpatory materials in the bill of particulars deprives Faith of notice. A bill of particulars serves to inform the accused of the misconduct alleged so that the accused has an adequate opportunity to prepare a defense.[22] By informing Faith of the allegedly incriminating facts known to the Bureau, the bill of particulars has accomplished this function. Faith's arguments concerning the informally submitted material,

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[22] *See e.g., United States v. Sklaroff*, 323 F.Supp. 296 (S.D. Fla. 1971) and cases therein; *United States v. Mangiaracina*, 10 F.R.D. 415 (W.D. Mo. 1950) and cases cited therein; *Wetmore v. Goodwin Film and Camera Company*, 226 F. 352 (D.N.J. 1915); *KFPW Broadcasting Company*, 33 FCC 2d 311 (1972).

therefore, do not raise a question of notice — particularly since the information and documents to which it refers are within its possession[23] — but rather the question of whether the issues are overbroad and should be reconsidered. We consider this argument premature.[24] At hearing Faith would have the right to submit all relevant, competent and material evidence in its defense. The Commission would then decide the merits as to each issue. We believe the formal hearing would be the most desirable context for considering these matters.[25]

26. We find that the bill of particulars does state allegations with sufficient clarity. We do not believe the notice provisions of the Communications Act require the Commission to conform to the technical rules of pleading applicable to judicial proceedings.[26] Rather, the Commission

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[23]Faith has not submitted the materials which it argues should have been considered prior to designation to the Commission; as a result, they are not part of the record before us.

[24]*Cf. United States v. Calandra*, 414 U.S. 338 (1974) (an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on inadequate or incompetent evidence.) In general, the Commission does not entertain petitions for reconsideration of a designation Order. Section 1.106(a)(1) of the Commission's Rules. Where it appears there is no genuine issue of material fact for hearing, a party may move for summary decision. Section 1.251 of the Commission's Rules.

[25]We do not read *Hickman v. Taylor*, 329 U.S. 495 (1947) or *United States v. Proctor and Gamble Company*, 356 U.S. 677 (1958) as requiring prehearing procedures such as Faith suggests. Those cases mandate full development of the relevant facts in anticipation of the formal trial.

[26]*Philco Corporation (Philco) v. FCC*, 293 F. 2d 864 (D.C. Cir. 1961); *Deep South Broadcasting Company v. FCC*, 293 F. 2d 264 (D.C. Cir. 1960); *Allen C. Bigham, Jr.*, 5 FCC 2d 220 (1966). Faith correctly observes that the Commission had a more thorough discussion of the evidence in the designation order in *Patrick Henry, supra*. That case, which involved reconsideration of a grant of license renewal following remand from the Court of Appeals and other extraordinary features, presented circumstances which in our view merited the type of discussion we gave them. The Commission has discretion in fashioning its orders provided that basic rights are observed. *FCC v. WJR*, 337 U.S. 265 (1949).

need only state a fact situation which, if established at hearing, would tend to show that grant of a license would contravene the public interest, convenience, and necessity. We conclude that paragraph 5 of the bill of particulars meets this requirement and furthermore that the facts alleged, if proved, would constitute a scheme or artifice to defraud.

5. In August 1977 the Commission received allegations that beginning in 1976 Dr. Gene Scott, pastor-president of Faith Center, began broadcasting fund-raising appeals on Television Station KHOF-TV for church projects which never came about and for specific purposes that were promised and not carried through. The allegations concerning fund-raising for audio equipment, studio lights, roof repairs, and a fountain of faith. The Commission also received allegations that Dr. Scott was using some of the money raised through over-the-air appeals for his own personal use by giving it to other organizations in which he had an interest. The Commission also received allegations that fund-raising appeals by Dr. Scott were sometimes accompanied by statements that he had pledged money and that he received only $1.00 per year in compensation from the church when, in fact, he failed to pay the alleged pledge and the church provided him with a $185,000 house rent free and a hotel suite in Pasadena, California costing $2,000-$3,000 per month. Since the Commission has not been permitted to examine television Station KHOF-TV's financial documents and other information in order to determine the truth of these allegations, the Commission cannot determine whether fund-raising broadcasts on Station KHOF-TV violated or presently violate, Title 18, U.S.C., Section 1343.

27. The allegations in paragraph 5 charge Dr. Scott with falsely stating that (1) funds solicited would be used for specific projects, (2) Dr. Scott contributed his own funds to Faith, and (3) Dr. Scott received only $1 a year from Faith. If such false statements were in fact made with fraudulent intent and viewers were thereby induced to part with their money, a scheme to defraud would be shown. A scheme to defraud is a broad concept not limited to narrow types of misrepresentations but comprising any scheme reasonably calculated to deceive persons of ordinary prudence and comprehension and includes misrepresentations of existing fact and future promises.[27]

28. In support of its position that the allegation of wire fraud must be made with greater specificity, Faith relies principally on *Burkett v. United States*.[28] Burkett, a civil service employee was fired for making malicious statements about his supervisor — specifically, of reporting an alleged security violation concerning his supervisor. The court held that the notice of charges issued against Burkett did not provide adequate notice in five respects: (1) it did not detail the contents of the statements Burkett made, (2) it did not specify to whom the statements were made, (3) it did not specify why Burkett's statements were deemed malicious, (4) it did not specify the nature of the harm Burkett intended to inflict, and (5) it contained irrelevant and potentially misleading statements.

29. A comparison of *Burkett* with the facts before us indicate that *Burkett* does not signal any defect in the bill of particulars here. Initially we note that procedures in-

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[27]*See e.g., Durland v. United States*, 161 U.S. 306 (1969); *United States v. McNeive*, 536 F. 2d 1245 (8th Cir. 1976); *Burns v. Paddock*, 504 F. 2d 18 (7th Cir. 1974); *Gusow v. United States*, 347 F. 2d 755 (10th Cir. 1965).

[28]403 F.2d 1002 (Ct. Cl. 1968) (hereinafter *Burkett*).

volved in *Burkett* are significantly different from those used by the Commission. In *Burkett* the single notice of charges fulfilled several functions: a complaint, a bill of particulars and discovery. Commission procedures, by contrast, not only provide for separate discovery proceedings but also for procedures that afford additional protection against unfair surprise even after the commencement of the hearing.[29] Moreover, the notice of charges in *Burkett* had to comply with an Army regulation which specifically stated that a notice of charges could not be subsequently amplified and could not rely "upon the presumption, even though warranted, that the employee will readily understand the basis for the proposed action."[30] This provision significantly restricts the normal assumptions concerning the adequacy of notice.[31] In ruling that the description of the alleged malicious statements lacked specificity, the court not only relied on the restrictive Army regulation but also on the principle

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[29]Even after the conclusion of discovery, the presiding judge has the discretionary authority to fashion appropriate safeguards. *Brahy v. FRC*, 59 F. 2d 879 (D.C. Cir. 1932); *Chronicle Broadcasting Company*, 20 FCC 2d 33 (1969); *D & E Broadcasting, Inc.*, 1 FCC 2d 78, 80-1 (1965); *Belk Broadcasting Company of Florida, Inc.*, 27 FCC 2d 921 (Rev. Bd. 1971).

[30]402 F. 2d at 1004.

[31]Normally an agency need not follow the technical rules of pleading but need only apprise the accused of the nature of the allegations with sufficient particularity to allow the accused a reasonable opportunity to prepare a defense. *Morgan v. United States*, 304 U.S. 1 (1938). Consequently, the circumstances of each case, including the difficulty of ascertaining the facts necessary to formulate a defense and the opportunity to learn the pertinent facts outside of the government's formal charges assumes paramount importance. *Sunstrand Corporation v. Standard Kollsman Industries, Inc.*, 488 F. 2d 807 (7th Cir. 1973); *Money v. Anderson*, 208 F. 2d 34 (D.C. Cir. 1953). Generally, lack of notice will not be found where the accused has not been misled, surprised, or has not otherwise suffered detriment. *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935 (5th Cir. 1971); *Cella v. United States*, 208 F. 2d 783 (7th Cir. 1953); *Hadigian v. Board of Governors, Federal Reserve System*, 463 F.Supp. 437 (D.D.C. 1978).

that Burkett was accused of defamation, which traditionally merits a highly precise description of the alleged defamatory statements. Wire fraud, on the other hand, as we have previously mentioned, is a broad offense. Moreover, unlike Burkett's alleged offense, which required a separate allegation of malicious intent, the necessary intent can be inferred from the nature of the facts comprising an alleged scheme of wire fraud.[32] Similarly, whereas the nature of the harm inflicted on Burkett's superior was speculative, the harm resulting from the alleged wire fraud here—the acquisition of money—is self evident. Finally, the bill of particulars here unlike Burkett's defective notice of charges, does not contain misleading, irrelevant matter.

30. Having discounted the applicability of *Burkett*, we turn to the truly fundamental consideration here. We see no danger that Faith will be prejudiced by any lack of specificity in the bill of particular. Faith has already learned the identity of the informants whose allegations form the basis for issue (c) and has had the opportunity to depose these individuals. If further clarification were necessary, Commission procedures discussed above would provide ample opportunity to prevent Faith from being surprised or misled.[33] Moreover, while arguing that the charges against it have not been stated with sufficient particularity, Faith inconsistently argues that it can readily rebut these charges. In any event, we expect that the financial records and videotapes available to Faith, in addition to what Faith has learned from deposing the Broadcast Bureau's informants and may learn from its employees, will apprise Faith of the necessary factual back-

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[32] *Gusow v. United States, supra.*

[33] *See* n. 29, *supra.*

ground.[34] Having discounted the possibility of prejudice to Faith we deem it irrelevant that Faith maintains its ability to demonstrate that the charges are groundless. This would be a question of fact for the hearing.

31. In particular we do not believe Faith has been prejudiced by the presiding judge's discovery Order FCC 80M-378, released March 6, 1980 which Faith alleges deprives it of the opportunity to amplify the bill of particulars. That Order declined to compel the Broadcast Bureau to answer 18 interrogatories served by Faith on November 26, 1979. In most respects we agree with the presiding judge that the interrogatories are improper. Several of the interrogatories are irrelevant. Interrogatory 8(a), for instance, asks when and how the Broadcast Bureau first learned videotapes were the property of Wescott. The Broadcast Bureau's investigative competence is not at issue here. For the same reason, Interrogatory 8(c) which asks what steps the Bureau took to secure the tapes directly from Wescott, interrogatory 12 which asks why the Bureau failed to attempt to secure the tapes directly from Westcott, interrogatory 17(b), which asks what efforts the Bureau made to determine whether its informants were biased, and interrogatory 18(a), which asks whether certain Commission personnel were shown copies of depositons, are irrelevant. Three other interrogatories are improper because they seek privileged information. Interrogatory 7(b) and (c) seeks the contents of statements obtained by the Bureau from its informants in anticipation of hearing. Interrogatory 18(b) seeks the contents of internal communications by Bureau investigators Rosenberg and Lyddane. To the extent interrogatory 18(b) seeks the views of Bureau investigators Rosenberg and Lyddane generally,

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[34]The instant case resembles *Cella v. United States, supra*, in which the nature of the alleged misconduct was clear but the government could not describe the precise occasions on which the misconduct occurred. As the defendant was not surprised or misled by the omission of these specifics no defect of notice was found.

we believe the Bureau has previously provided adequate information in its response to Faith's first interrogatories. We also believe the Bureau has adequately answered interrogatories 8(d) and 11 which inquire as to information concerning the contents of the videotapes sought by the Bureau. The Bureau has stated that it does not know the contents of the videotapes in question.

32. Most of the remaining interrogatories raise the question of the extent to which a licensee may seek the opinions of the Broadcast Bureau by interrogatory in order to clarify the issues. The Bureau's position seems in essence to be that all such inquiries are prohibited by Section 1.311(b)(4) of the Rules.[35] While the Bureau's position in this regard may be overdrawn, we need not reach this question. Even if the liberal discovery rules used in the federal courts were applicable here, the vast majority of Faith's interrogatories would still be improper.[36] Because discovery may not be used as a stratagem to maneuver an opponent into a disadvantageous position, interrogatories may not be used to require a party to furnish its opponent with a refutation of its own claims, particularly where that information is more readily available to the inquiring party.[37] Thus, interrogatory 5, asking for facts and information indicating that specific projects were carried out, interrogatory 7(b), asking for facts

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[35]Section 1.311(b)(4) states: "Commission personnel may be questioned generally by written interrogatories regarding the existence, description, nature, custody, condition and location of relevant documents and things and regarding the identity and location of persons having knowledge of relevant facts, and may otherwise only be examined regarding facts of the case as to which they have direct personal knowledge."

[36]The Commission's discovery procedures derive in part from the Federal Rules of Civil Procedure, *Discovery Procedures*, 11 FCC 2d 185, 186 (1968).

[37]*See United States v. Renault, Inc.*, 27 F.R.D. 23 (S.D.N.Y. 1960) *See also Aktiebolaget Vargos v. Clark*, 8 F.R.D. 635 (D.D.C. 1949).

and information indicating that Dr. Scott did not represent his remuneration to be $1.00 a year, interrogatory 13(b), asking for information provided by Faith favorable to Faith, interrogatory 14, asking for other information without limitation favorable to Faith, and interrogatory 17(a), asking for all information tending to show that Bureau informants are biased, are improper. Moreover, interrogatories become unjustified when they ask for an excessive amount of legal argumentation including characterization of the evidence.[38] On these grounds we reject Faith's interrogatories 4(a) and (b), which ask the Bureau to construe the wire fraud statute, interrogatories 10(a) and (b), which ask why the taking of certain depositions are essential to the determination of the issues, interrogatory 7(a), which asks whether Faith may rely on the issues being limited to certain factual questions,[39] interrogatory 8(b), which asks for all facts and information tending to show that Wescott may not freely dispose of its property, interrogatory 8(e), which asks for facts and information tending to show Faith is required to have custody of the videotapes, interrogatory 13(a), which asks for all facts and information provided by the licensee tending to be incriminatory, interrogatory 15, which asks for all facts

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[38] *See e.g., Harlem River Consumers Cooperative Inc. v. Associated Grocers of Harlem, Inc.*, 64 F.R.D. 459 (S.D.N.Y. 1974); *Reichert v. United States*, 51 F.R.D. 500 (N.D. Cal. 1970); *Zinsky v. New York Central Railroad Company*, 36 F.R.D. 680 (N.D. Ohio 1964); *United States v. Renault, Inc., supra*; *Payer, Hewitt & Co. v. Bellanca Corporation*, 26 F.R.D. 219 (D. Dela. 1960); *United States v. Maryland and Virginia Milk Producers Association*, 22 F.R.D. 300 (D.D.C. 1958).

[39] We do not believe the public interest would be served by restricting the evidence introduced at hearing to contentions previously advanced by the Bureau. The public interest is best served by the fullest possible development of the issues. As previously noted, however, the licensee is entitled to protection against undue surprise. *Cf. Pressley v. Boehlke*, 33 F.R.D. 316 (W.D.N.C. 1963); *McElroy v. United Airlines*, 21 F.R.D. 100 (W.D. Mo. 1957). (Applying an analogous rule in civil litigation).

and information tending to show Faith did not assert its objections to the investigation in good faith, and interrogatories 16(b), (c), and (d), which asks for all facts information tending to show that a licensee may rely on the "Blume letter"[40] and not cooperate with a Commission investigation involving a potential criminal violation. In addition, although they are not entirely clear, interrogatories 6(a) and (c) appear to seek a legal exposition on the definition of what constitutes a "designated project" for which funds were solicited and what constitutes Dr. Scott's "personal gain."

33. The Commission would be inclined to grant Faith's motion to compel with respect to interrogatories 1-3 and 6(b), provided these interrogatories were narrowly construed. We would also compel the Bureau to answer, in response to interrogatory 16(a), whether Faith employees were ever advised that pursuant to the "Blume letter" they need not cooperate with Commission investigators and that Faith would not be penalized for their failure to cooperate. The Bureau would also be compelled to answer interrogatories 9(a), (b) and (c), inquiring as to procedures followed in attempting to subpoena Faith's employees to obtain their deposition. While these are not relevant to any existing issue, they do appear to be relevant to the emerging question of whether Faith advised its employees to avoid service of the subpoena. In any event, however, in view of the fact that we will affirm the dismissal of Faith's renewal application, these questions are now moot. There is, of course, no point in the Bureau's now answering these interrogatories and no prejudice has accrued from its previous failure to answer. We considered these interrogatories in detail, how-

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[40]The "Blume letter" described procedures followed by Commission investigatory personnel. *See, infra*, para. 34 *et seq.*

ever, to satisfy ourselves that the Bureau's failure to answer them neither constituted a deprivation of due process to Faith nor provoked the obstructive behavior which prompted the dismissal of Faith's application.

III. The "Blume Letter"

34. Faith asserts that the Commission's designation of issues (a) and (b) is contrary to the so-called "Wiley Guidelines" or "Blume Letter", a letter dated March 20, 1975, from then Chairman Wiley to Jack P. Blume, then president of the Federal Communications Bar Association. According to Faith, Commission staff presented this letter to Faith at the time of investigation and, therefore, the Commission is bound by its terms. Faith cites language in the letter stating that the Commission does "not penalize a licensee for failure to cooperate in an investigation." Faith maintains that issues (a) and (b), which relate respectively to Faith's alleged refusal to allow Commission investigators access to its books and records and to submit materials requested in the Commission's June 15, 1978 by direction letter, are inconsistent with this representation.

35. The Broadcast Bureau replies that Faith's interpretation of the Blume letter is erroneous. In the Bureau's view the quoted language relied on by Faith relates only to the effect of noncooperation on determining the amount of any forfeiture assessed against a licensee. The Bureau rejects the claim that the Blume letter precludes the Commission from designating an issue against a licensee for failing to cooperate with a Commission investigation, contending that this interpretation of the letter would "literally preclude the Commission from carrying out regulatory responsibilities . . ." and permit the licensee to "terminate an investigation by stonewalling Commission investigators . . . ." Moreover, the Bureau notes that the designation of Faith's application for hearing was preceded by the Commission's June 15, 1978 by direction letter, which rejected Faith's

constitutional arguments and advised Faith that failure to submit the requested information would result in designation for hearing. Thus, argues the Bureau, Faith had notice that it could not rely on the Blume letter in this regard.

36. In our view Faith has misconstrued the effect of the Blume letter which, as was the case with Faith's notice argument, does not directly bear on the dismissal of Faith's application. As the Blume letter states on its face, it merely reports the results of an informal review by Former Chairman Wiley of procedures followed by Commission investigators. The letter is not a Commission rule or regulation, was not intended to have the force and effect of law and, therefore, cannot in any way bind the Commission.[41] The Commission's policies applicable to this proceeding were amply set forth in our letter to Faith of June 15, 1978. There we rejected Faith's objections to producing the requested information, concluded that Faith had no justification for withholding information from Commission investigators, and indicated that failure to comply could result in designation for hearing. We certainly did not recognize any "privilege" against cooperation with Commission investigators or right to demand a formal §403 investigation. In

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[41] *See Brennan v. Ace Hardware Corporation*, 495 F. 2d 368 (8th Cir. 1974); *Hawkins v. State Agriculture Stabilization an Conservation Committee*, 149 F.Supp. 681 (S.D. Tex. 1957). Moreover, even if Broadcast Bureau personnel had erroneously stated that Faith could rely on the Blume letter in withholding information, such representations would not foreclose our inquiry. The government is not estopped by the unauthorized representations of its agents. *See, e.g. Leimbach v. Califano*, 596 F. 2d 300 (8th Cir. 1976) *cert. denied*, 431 U.S 937 (1977); *Thanet Corporation v. United States*, 591 F. 2d 629 (Ct. Cl. 1979). On the other hand, any representations made by the Broadcast Bureau in conjunction with the Blume letter would be relevant to an evaluation of Faith's motives. But, as we previously stated, any reliance by Faith would be inconsistent with our June 15, 1978 by direction letter.

any event, whatever significance the Wiley letter might have had prior to the issuance of the June 15, 1978 letter, this was superseded by the June 15 letter.[42]

37. Moreover, Faith's attempted Construction of the Blume letter is clearly unreasonable. Unresponsiveness to Commission inquiries may reflect lack of candor or misrepresentation indicating that a licensee is unfit.[43] For this reason, any purported policy barring inquiry into failure to cooperate with Commission investigators or other Commission inquiries would be incompatible with our obligations under the Communications Act. The Act requires us to make a finding that the public interest, convenience, and necessity would be served thereby before granting any renewal application.[44] Where such a finding cannot be made the application must be designated for hearing.[45] It would be inconsistent with these responsibilities to close our eyes to the possibility that a licensee's noncooperation with Commission investigators stemmed from character deficiencies

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[42]As Faith notes, the Commission did say in the June 15 letter: "The Commission recognizes that [Faith's] objections are advanced in good faith and in the licensee's sincere belief in their validity." As described below, however, subsequent events have proven that statement overly generous.

[43]*See, e.g., FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *Wadeco, Inc. v. FCC*, Case No. 78-1913 (D.C. Cir. April 1980); *Las Vegas Valley Broadcasting Company v. FCC*, 589 F. 2d 594 (D.C. Cir. 1978); *Janus Broadcasting Company*, 47 RR 2d 805 (1980); *Vinita Broadcasting Company, Inc.*, 30 FCC 2d 458 (1971); *Nick J. Chaconas*, 28 FCC 2d 231 (1971); *Radio Broadcasters, Inc.*, 23 FCC 2d 209 (1970).

[44]Communications Act of 1934 as amended §§307-9, 47 U.S.C. §§307-9 (1977).

[45]*Id.*

undercutting the licensee's basic qualifications.[46] Certainly, the Blume letter cannot be interpreted to have this effect.

38. In any event, a close reading of paragraph 5 of the Blume letter does not support Faith's interpretation. The paragraph begins: "The cooperation of a station with an investigation is not a factor in determining the amount of a forfeiture." The question of how the amount of forfeiture is determined is unrelated to that of whether noncooperation with a Commission investigation evidences lack of candor reflecting adversely on a licensee's basic qualifications. A subsequent phrase relied on by Faith — "Although we do not penalize a licensee for failure to cooperate in an investigation" — must be construed in the context of the overall subject of the paragraph, forfeitures. Moreover, the paragraph goes on to say: ". . . we expect [a licensee] to cooperate and to be candid and open with our investigators, and we intend to issue Orders for formal 403 inquiries in those cases where a licensee's obstruction of an informal investigation makes it impossible to ascertain the facts." This language belies any possibility that obstructive behavior would not have further consequences for the licensee.

IV. Constitutional Arguments

39. Faith asserts that the solicitation of funds encompassed by issue (c) is protected by the First Amendment and that the government bears the burden of demonstrating a

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[46]That the Commission should not adopt procedures that foreclose full inquiry into public interest factors was enunciated in *Retail Store Employees Union, Local 880, Retail Clerks International Association, AFL-CIO v. FCC*, 436 F. 2d 248 (D.C. Cir. 1970). An alleged privilege against cooperation with Commission investigators would also be inconsistent with the Commission's grant of full power to conduct investigations. *See FCC v. Schreiber*, 201 F.Supp. 421 (S.D. Cal. 1962) *modified and aff'd* 329 F. 2d 517 (9th Cir. 1964) *modified* 381 U.S. 279 (1965); *Stahlman v. FCC*, 126 F.2d 124 (D.C. Cir. 1942). *See also* Communications Act of 1934 as amended §403, 47 U.S.C. §403 (1977); Section 73.1225(a) of the Rules.

compelling state interest achievable by no less intrusive means before Faith is required to divulge any information concerning these practices. Inquiry into Faith's fundraising practices would, in Faith's view, violate the free exercise clause of the First Amendment. Faith characterizes its fundraising activities as embodying a "credal belief that giving is an act of sacrifice and worship."[47] Faith considers its pastor, Dr. Scott, as God's chosen representative, to have the power to determine the application of any funds donated. Were the Commission to question the use of these funds, argues Faith, it would be unconstitutionally testing the truth or falsity of religious belief and substituting the judgment of the agency in place of the ecclesiastical hierarchy. In particular, Faith objects to any inquiry into the expense records of Faith's pastor, because the church-minister relationship is especially privileged. Faith also contends that inquiry into Faith's financial affairs violates the establishment clause of the First Amendment. Faith argues that such inquiry would create excessive entanglement of the government into church affairs.

40. In maintaining that the Commission may not require disclosure of Faith's financial affairs without demonstrating the existence of a compelling state interest achievable by no less intrusive means, Faith faults the presiding judge for not ruling on all constitutional claims prior to discovery. For this proposition, Faith relies principally on *Surinach v. Pesquera de Busquets*.[48] Faith finds the Bureau's second interrogatories, because they are broader in scope than the first interrogatories, particularly objectionable. Faith sug-

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[47]Faith elaborates on the nature of its religious beliefs in a document titled "The Theology of Giving" contained in its February 1, 1979 response to the Broadcast Bureau's interrogatories.

[48]604 F. 2d 73 (1st Cir. 1979) (hereinafter *Surinach*).

gests that criminal prosecution or a show cause proceeding represent less intrusive alternatives to the course of action followed here.

41. The Broadcast Bureau responds that Faith misstates established principles of law. According to the Bureau, Faith may not shield itself from Commission scrutiny by merging its broadcast and religious activities. Rather, argues the Bureau, Faith takes its broadcast license burdened with public interest obligations justifying Commission inquiry. Moreover, the Bureau denies that a person may, under the cloak of religion, commit frauds on the public with impunity.

42. The Commission does not accept Faith's constitutional arguments. We recognize of course that religious solicitations are protected by the First Amendment. But we strongly disagree with Faith as to the nature and extent of that protection. By attempting to characterize its fundraising activities as expressions of belief and worship, Faith disregards an axiomatic distinction in First Amendment law between freedom to believe and freedom to act.[49] While freedom to believe is absolute, conduct is subject to government regulation, although an indirect burden on religious belief may result.[50] Thus, solicitation, as a form of conduct, may be subject to government regulation of numerous types including regulation designed to prevent fraud on the public.[51] As Faith correctly points out, the First Amendment imposes definite limitations on the form such regulation may take. For example, a statement of religious belief may not be characterized as a fraudulent misrepresentation —

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[49]*Cantwell v. Connecticut*, 310 U.S. 296, 303-4 (1940).

[50]*Sherbert v. Verner*, 374 U.S. 398 (1963); *Braunfeld v. Braun*, 366 U.S. 599 (1961).

[51]*Cantwell v. Connecticut, supra. See also Prince v. Massachusetts*, 321 U.S. 158 (1944).

only statements of secular fact may be so characterized.[52] In the present case, the alleged misrepresentations indeed represent statements of fact *i.e.*, the use to which solicited funds would be put, Dr. Scott's compensation, and whether Dr. Scott pledged his own funds. To the extent Faith disputes the nature of the statements actually made, Faith raises factual questions more appropriately resolved at an evidentiary hearing. The mere possibility that Faith may have a defense to the allegations does not justify obstructing the trial of these issues. Another limitation Faith correctly points out, is that regulations designed to prevent fraud may be no broader than necessary. For this reason, courts have frequently struck down licensing schemes in which the state has attempted to impose blanket prohibitions on public solicitation subject to the unrestrained discretion of public officials, or has attempted to impose overly restrictive financial constraints on solicitors.[53] Faith accurately observes that the courts have preferred that the state undertake to prosecute specific acts of fraud rather than resort to the types of licensing schemes found unconstitutional. We believe the Commission has complied with these principles. We have not imposed any prior restraint on Faith's becoming a Commission licensee; nor have we instituted indiscriminate pro-

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[52]*United States v. Ballard*, 322 U.S. 78 (1944). *Compare* 322 U.S. at 86-8 and 322 U.S. at 83-4. *Accord Church of Scientology of California v. Richardson*, 437 F. 2d 214 (9th Cir. 1971); *Founding Church of Scientology v. United States*, 409 F. 2d 1146 (D.C. Cir. 1969). *SEC v. World Radio Mission, Inc.*, 544 F. 2d 535 (1st Cir. 1976). Similarly, a church may establish property interests by ecclesiastical law. *Jones v. Wolf*, 443 U.S. 595 (1979).

[53]*Village of Schaumburg v. Citizens for a Better Environment*, 100 S.Ct. 826 (1980); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943); *Cantwell v. Connecticut, supra*; *Lovell v. Griffin*, 303 U.S. 444 (1938); *Fernandes v. Limmer*, 465 F.Supp. 493 (N.D. Tex. 1979); *International Society for Krishna Consciousness v. Engelhardt*, 425 F.Supp. 176 (W.D. Mo. 1977).

spective examination of Faith's affairs. Rather, we have acted only in response to allegations of specific fraudulent acts, which we must examine in order to make a determination whether to renew Faith's license. As for Faith's proposed less restrictive alternatives, we see no reason to have referred this matter to the Justice Department prior to taking action on our own when the Commission has concurrent jurisdiction in this area.[54] To do so would prolong these renewal proceedings indefinitely. Nor has Faith shown why a show cause proceeding would be a desirable alternative.

43. Faith's excessive entanglement argument similarly misses the mark. The Commission does not intend any continuing entanglement in Faith's affairs.[55] As stated above, we have the narrow purpose of investigating an allegation of specific fraudulent conduct. Because our inquiry relates to a narrow and legitimate governmental interest, it is readily distinguishable from that found offensive in *Surinach*.[56] That case dealt with an order by the Puerto Rican Department of Consumer Affairs directed to Catholic Church related schools requiring them to produce extensive financial information concerning their operations. This Order was issued pursuant to the Department's mandate to restrain inflationary trends and to establish and monitor price controls on goods and services. In the court's view, the preliminary information gathering by the Department could not be severed from the Department's logical goal, the institution of cost ceilings for Catholic Schools. As the court

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[54]See *FCC v. American Broadcasting Company*, 347 U.S. 284 (1954).

[55]*Compare NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Lemon v. Kurtzman*, 403 U.S. 602 (1979) (Where government would have had continuous supervisory presence over conduct of religious schools).

[56]The presiding judge similarly distinguished *Surinach* in FCC 79M-1086, released September 17, 1979.

concluded that such ceilings would seriously interfere with the Catholic school's ability to carry out their religious mission and would entangle the state in decision making more appropriately left to the church, activities of the Department constituted a clear and present threat to the schools' First Amendment rights. Moreover, inflationary trends could have been investigated without specific inquiry into parochial schools. Our consideration of alleged fraudulent activities by a specific church-licensee bearing on that licensee's qualifications in no way resembles the government actions found objectionable in *Surinach*.[57] Furthermore, the Commission is not proposing to entangle itself into the delicate relationship between a church and its pastor.[58] Our concern with Dr. Scott's compensation and contributions arises because Dr. Scott allegedly misrepresented these over the air.

44. We also reject Faith's suggestion that its fundraising is a matter between Faith and its congregation. By conducting its fundraising by means of television, Faith has elected to occupy a forum that is not only distinctly public in character, but one of a limited number of such public forums. Faith thereby subjects itself to public interest obligations.

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[57]*Surinach* itself expressly distinguished the facts before it from a case "in which the records of a religious organization are subpoened pursuant to a criminal investigation, a situation in which the states' interest unquestionably is strong." 604 F. 2d at 80. *See also In re Rabbinical Seminary*, 450 F.Supp. 1078 (E.D.N.Y. 1978) (where the court approved the disclosure of large amounts of financial information pursuant to a grand jury investigation of a religious institution allegedly obtaining federal aid to education funds fraudulently). The type of entanglement found objectionable in *Surinach* closely resembles that disapproved in *Lemon v. Kurtzman, supra*.

[58]Compare *McClure v. Salvation Army*, 460 F. 2d 553 (5th Cir 1972) (employment discrimination law not applicable to Church-minister relationship).

> A religious group, like any other, may buy and operate a licensed radio or television station. [citation omitted]. But, like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations.' *Office of Communications of United Church of Christ v. FCC*, 359 F. 2d 994, 1003 (1966). There are, concededly, constitutional limits on the conditions which the FCC may impose. But the Constitution does not obligate the FCC to relinquish its regulatory mandate so that religious sects may merge their licensed franchises completely into their ecclesiastical structures.[59]

Thus, the exercise of Faith's First Amendment rights must be delicately balanced against possible injury to the public. Faith might have been able to show that its conduct on the merits, while open to question from a purely secular point of view — if indeed open to question at all — was nevertheless protected by the First Amendment.[60] As we have said, Faith would have had the opportunity to assert at the hearing that its representations, because of their relationship to Faith's religious creed, should not be considered fraudulent. However, we reiterate that the possible existence of a defense would not bar hearing the merits of the case. Indeed, such a position would raise serious constitutional problems in itself. Faith's view would tend to create a favored class of licensees immune from Commission scrutiny although questions justifying inquiry into other licensees

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[59] *King's Garden, Inc. v. FCC*, 498 F. 2d 51, 60 (D.C. Cir. 1970) *cert. denied*, 419 U.S. 996 (1974). *See generally FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969). *Cf. SEC v. World Radio Mission, Inc., supra, Muhammed Temple of Islam v. City of Shreveport, Louisiana*, 387 F.Supp. 1129 (W.D.L.A. 1974), *aff'd*, 517 F. 2d 922 (5th Cir. 1975).

[60] *Cf. Anti-Defamation League of B'nai B'rith, Pacific Southwest Regional Office v. FCC*, 403 F. 2d 169 (D.C. Cir. 1968) *cert. denied*, 394 U.S. 930 (1969) (anti-semitic remarks protected).

existed. Membership in this preferred class would rest on a prior evaluation of the licensee's asserted religious creed, here "The Theology of Giving." By contrast, evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture.[61]

45. As we have concluded that Faith's general constitutional claims are groundless, we are left with the possibility that specific discovery requests are prohibited. We agree with the presiding judges below that Faith has not demonstrated that specific discovery requests are either irrelevant to the Commission's legitimate inquiry or that they would subject Faith to specific, demonstrated harm.[62] Therefore we conclude that Faith was without justification in refusing to respond to those discovery requests and Orders discussed in the next section.[63] Absent justification, we do not consider the mere assertion of Faith's constitutional claims to immunize Faith from the consequences of failing to comply with valid Commission procedures during discovery.[64]

V. Faith's Discovery Performance

46. The presiding judge based his dismissal of Faith's renewal application on the conclusion that Faith failed to respond to Broadcast Bureau discovery requests in good

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[61]*Cf. Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).

[62]*See in re Rabbinical Seminary, supra. See generally, Buckley v. Valeo*, 424 U.S. 1 (1976); *NAACP v. Alabama*, 357 U.S. 449 (1958).

[63]One particular point deserves special mention. Although individual membership records of a political or religious organization may, under some circumstances, be protected from disclosure by the First Amendment, this principle cannot automatically be extended to an organization's officials and solicitors. *NAACP v. Alabama, supra*. Thus, we have sought disclosur of Dr. Scott's contribution records for the relevance to the fraud issue.

[64]*Cf. Barenblatt v. United States*, 360 U.S. 109 (1959) (contempt of congress ruling upheld over claim of freedom of association violation).

faith and thereby deliberately obstructed the proceedings. Reviewing Faith's overall discovery performance, the presiding judge held that Faith's failure to comply strictly with the December 4 discovery Order led to this result. At issue are the first two rounds of discovery initiated by the Broadcast Bureau. These consist of (1) 16 interrogatories and 5 classes of document requests served December 8, 1978 and (2) 39 interrogatories and 20 classes of documents requests served October 1, 1979. The presiding judge interpreted Faith's responses to these discovery requests as a studied effort to avoid producing documents and information harmful to its case. He accused Faith of failing to make prompt, specific, and reasonably detailed responses and of answering only in an incomplete and piecemeal fashion after securing extensions from the presiding judges. The ALJ found that these Orders remain, in large measure, unmet. Under the circumstances, and in light of Faith's perceived bad faith, the ALJ concluded that Faith had failed to prosecute its application within the meaning of the Commission's rules.[65]

47. The pertinent procedural history is as follows.[66] Faith initially responded to the Bureau's first round of discovery on February 1, 1979. Faith's incomplete response prompted the Bureau to file a motion to compel on March 2, 1979. Faith opposed the Bureau's motion, in main part,

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[65]The Broadcast Bureau served its third interrogatories comprising 17 interrogatories and the third motion for production of document comprising 5 classes of documents on November 27, 1979. On December 10, Faith objected in whole or part to 12 interrogatories and answered 5. By Order FCC 80M-96, released January 17, 1980, Judge Luton upheld Faith's objection to 7 interrogatories and ordered Faith to answer 5 others. Faith provided further answers to the five interrogatories on February 1, 1980. The ALJ did not make Faith's performance with respect to the third interrogatories a factor in dismissing its application and for that reason, absent any indication that Faith's performance mitigates its previous misconduct, we need not reach that question.

[66]*See also* para. 7 *et seq.*, *supra*.

on the grounds that the bill of particulars was defective since it did not allege a specific violation of 18 USC §1343, that the motion was an impermissible fishing expedition and that the motion violated Faith's First Amendment right of freedom of religion. The ALJ ordered Faith to make further response to interrogatories 6 and 8-16 by April 13 and to produce the requested documents at a mutually convenient time.[67] Generally, the ALJ ordered Faith to respond with information regarding how money donated was dedicated or expended for projects for which it was solicited and donated, specific information about funds spent for Dr. Scott's personal use, and noted that Faith had refused to answer interrogatories on constitutional bases which had been rejected at the prehearing conference.

48. Faith sought leave to appeal to the Commission on April 20, 1979 and filed a notice of appeal with the D.C. Circuit on May 9, 1979.

49. In its appeal to the Court of Appeals, Faith argued that in the absence of a proper charge, the Bureau's discovery requests constitute an unreasonable search and seizure in violation of the Fourth Amendment and that the Bureau's requests violate the First Amendment rights of the church and will result in an unwarranted entanglement by the Commission in church activities and affairs. The presiding judge denied Faith's request for appeal to the Commission and ordered Faith to respond to discovery.[68] On June 14 Faith moved for a stay pending Faith's judicial appeal. The ALJ denied the stay motion and ordered discovery by July 18. On July 11, Faith moved for a stay

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[67]N. 11, *supra*.
[68]N. 12, *supra*.

before the Court of Appeals. The court denied the stay and summarily dismissed the appeal on July 13, 1979.[69]

50. Within a week of the court's decision, on July 18, 1979, Faith submitted its further responses to the Broadcast Bureau's first discovery request. The ALJ, however, remained dissatisfied with Faith's responses to interrogatories 6, 10, and 13-16 those interrogatories inquiring into how funds solicited for particular causes were expended, funds turned over to Wescott, and Dr. Scott's pledges and contributions, and also noted that Faith had still failed to produce most documents requested, primarily videotapes of the "Festival of Faith" program. Setting a hearing date of October 30, 1979, the Presiding Judge ordered further responses by August 17.[70]

51. Of the responses submitted on August 17, the ALJ remained dissatisfied with the responses to interrogatories 13-16, which inquired into Dr. Scott's pledges and contributions. Moreover, videotapes requested in one of the document requests were not submitted.[71]

52. The Broadcast Bureau served its second round of discovery on October 1, 1979. Faith responded on October 24 with a pleading that did not specifically answer a single interrogatory or produce any documents. Faith was then faced with the ALJ's Order (1) directing further responses by December 18 (2) and further document production and (3) threatening dismissal.[72] The ALJ noted that Faith had not answered a single interrogatory contained in the Bureau's second request, and that its objections consisted largely of generalized complaints which did not assist ma-

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[69]N. 13, *supra*.
[70]N. 14, *supra*.
[71]*See* n. 15, *supra*.
[72]N. 18, *supra*.

terially resolution of the matters under consideration. Faith appealed to the Commission on December 13 and on the same date moved for a stay, which was denied.[73]

53. The presiding judge devotes the bulk of his dismissal order to the perceived deficiencies in Faith's December 18 responses and Faith's failure to produce the vast majority of the requested documents. He concluded that Faith's responses to interrogatories 8, 9, 11, 21-26, 32, 35, and 38 were inadequate. These interrogatories sought information about projects for which funds were solicited, donations received for specified purposes, documents in the possession of Wescott relating to Faith's finances, the existence and location of "Festival of Faith" tapes, information in possession of Wescott relating to the "Festival of Faith" program, how Wescott expended Faith monies and the basis for Faith's assertion that Wescott was concerned about government entanglement when asked to provide information. Additionally, he found that Faith's responses to interrogatories 3, 4, 8, 10-12, 15, 34, and 36 were made in bad faith. These interrogatories inquired into the identity of Faith personnel who reviewed Faith's financial records, the identity of programs during which solicitations were made, the identity of projects for which solicitations were made, whether Faith segregated broadcast solicitations from other funds, documents in the possession of Wescott relating to the finances of Faith, the identity and duties of the officers and directors of Faith, Dr. Scott's business and personal expenses, monies he received, and Dr. Scott's contribution records.

54. Faith contends that it has rendered substantial compliance during the discovery phase of these proceedings. Preliminary, Faith faults the presiding judge for suggesting

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[73]FCC 79-875, released December 28, 1979.

impropriety in Faith's judicial appeal of the first discovery Orders and requests for extension of time. Faith claims it has good cause for pursuing a judicial appeal, for seeking extensions of time, and for a stay *pendente lite*. Moreover, Faith asserts it has furnished virtually all of the information requested and was justified in withholding any information not disclosed.

55. Similarly, Faith objects to the ALJ's treatment of Faith's responses to the second round of discovery requests. Faith considers the requests for numerous financial records unduly burdensome. It also complains that the ALJ overlooked the fact that much of the information requested by the second round of interrogatories and document requests was not in Faith's possession but rather in the possession of its sister church, Wescott. Although the two churches share some common officers, Faith considers it a misapplication of agency law to attribute knowledge gained by the common officers, notably Dr. Scott, as agents of Wescott, to Faith. Additionally, Faith accuses the ALJ of derogating its *bona fide* constitutional claims regarding its religious doctrines. Faith submits that it has substantially complied with the second round of discovery.

56. The Broadcast Bureau essentially concurs with the ALJ's analysis of Faith's performance.

57. Having examined the record in this case, it is our considered view that Faith's consistent refusals to respond during the discovery phase of this proceeding so obstructed the orderly conduct of these proceedings that Faith has failed to prosecute its application. We further find that Faith's performance during the discovery phase of these proceedings displays bad faith. Of critical significance in reaching this conclusion is Faith's continued failure to respond subsequent to the Court of Appeal's summary dismissal of its appeal on constitutional grounds on July 13, 1979. At this

point Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process warranting dismissal of its application. As a final matter, as will be explained below, we do not agree with Faith that the ALJ erred in any material way in compelling responses to the Bureau's discovery requests. Therefore, we affirm the dismissal with prejudice of Faith's application.

58. Faith's initial response to the Broadcast Bureau's first set of interrogatories gave satisfactory answers to only six of the 16 interrogatories propounded. Faith objected on constitutional grounds to four interrogatories inquiring about pledges allegedly made by Dr. Scott (No. 13-16) and to interrogatories asking what funds were transferred by Faith to Wescott (No. 10) and to Sunset Mausoleum (No. 12). Faith also attempted to justify unresponsive answers to interrogatories asking whether funds solicited were expended for Dr. Scott's personal use (No. 8), the debts and obligations existing between Faith and Wescott (No. 9), and what interest Faith had in Sunset Mausoleum (No. 11).[74]

59. The Court of Appeals on July 13, 1979 summarily dismissed Faith's attempt to vindicate these claims judicially. At this point, in our view, Faith was clearly put on notice that its constitutional claims furnished no basis for refusing to comply with the ALJ's determination as to the propriety of discovery requests if indeed they were not already put on notice by our June 15, 1978 by direction letter. Nevertheless, five days after the issuance of the court's decision, Faith filed another inadequate response to the in-

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[74]In response to interrogatory 6, Faith was dilatory in supplying an adequate statement of disbursements relating to specific projects. A statement satisfactory to the ALJ was not supplied until Faith's third response to the interrogatory on August 17, 1979.

terrogatories. Faith failed to provide the information requested about the four interrogatories concerning Dr. Scott's pledges (No. 13-16).[75] Moreover, Faith did not disclose the amount of funds raised which were turned over to Wescott to be "handled on Faith's behalf" (No. 10) or provide a satisfactory statement of disbursements made for specific projects (No. 6).

60. With regard to the four questions concerning Dr. Scott's personal pledges (Nos. 13-16), the Commission fully agrees that the responses Faith gave on August 17, 1979 are especially egregious. They are patently evasive, and are the third in a series of unresponsive answers to the same interrogatories. Faith initially answers the interrogatory "State what representations were made by Dr. Scott in each instance of a solicitation as to the pledge of his own funds" with the apparently straightforward statement" "*No* 'representations were made by Dr. Scott in each instance of a solicitation to a pledge of his own funds'." Faith, however, goes on to make an offer of "expanded answers to what it thinks the interrogatories might really intend to seek as information." What the interrogatories sought as information was what they clearly stated, and Faith has no bona fide reason to attempt a distinction. Faith then takes the completely unwarranted position that the Commission's June 15, 1978 by direction letter, in which the Commission stated it would not require at that time the disclosure of all individual donor records, exempted Dr. Scott's donor records from disclosure. The distinction between Dr. Scott's records and the records of rank and file contributors has always been clear, and Faith has no basis for its contrived interpretation. Faith then begins its "expanded answer,"

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[75]Instead Faith proffered an affidavit stating that Dr. Scott had paid all pledges.

with the statement: "To the best of its knowledge, Faith can recall no instance of a solicitation in which representations were made by Dr. Scott as to a pledge of his own funds. However, at the same time solicitations were being made, along with many other respondees Dr. Scott was known to have made pledges." The "expanded answer" continues with the same kind of ambiguity and equivocation in which Faith denies that any representations were made while simultaneously describing and discussing what are apparently pertinent representations. The net effect of Faith's answer is obfuscation and a demonstration of its bad faith.

61. Through this sequence of events Faith also failed to supply an important class of documents, the master videotapes of the "Festival of Faith" program, which Faith complained were in Wescott's possession. As will be explained, we consider its rationale for this failure groundless.

62. The Commission similarly concurs in the presiding judge's criticism of Faith's responses to the second set of interrogatories. Even if some of the points in Faith's initial response to the Bureau's second set of interrogatories were valid, we can see no justification for Faith's failing to answer a single one of the 39 interrogatories and 20 document requests. While there may be some merit to Faith's complaints that it would be difficult to supply all information requested in the alloted time period, Faith need not have resorted to a blanket objection. At the very least, Faith could have specifically indicated in those instances where specific responses were not immediately feasible, and what information would require further time to compile.

63. Finally, we disagree with Faith's argument that inquiry into Faith's fundraising beyond the specific incidents mentioned in the bill of particulars is irrelevant. Even assuming, *arguendo*, that some reason exists for giving the

specific instances mentioned in the bill of particulars primary importance,[76] it would nevertheless be relevant to Faith's qualification to remain a Commission licensee to know whether the originally alleged instances of fraud were part of a pattern of conduct.

64. When Faith finally gave specific responses to the Bureau's second interrogatories, these responses, in our view, displayed serious deficiencies and bad faith. Most notable is Faith's withholding of information concerning Wescott and Dr. Scott, ostensibly on the grounds that Dr. Scott's knowledge of these matters was obtained in capacities other than as an officer of Faith. Faith bases this argument on a principle of agency law purportedly enunciated in *Ruberoid Company v. Roy*[77] to the effect that knowledge acquired by an agent while acting other than on behalf of his principal is not imputed to the principal. Faith also alleges that Dr. Scott's interests are adverse to Faith. Faith contends its interpretation is buttressed by the ALJ's ruling striking Dr. Scott as a named respondent to the second interrogatories. In Faith's opinion, the severance of Dr. Scott indicates that Dr. Scott should not be required to divulge any knowledge not acquired as Faith's agent.

65. We agree with the ALJ that this line of reasoning is a bad faith contrivance. The interrogatories were properly addressed to the corporate licensee. Although interrogatories

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[76]As indicated previously, (No. 29, *supra*) Commission procedures provide safeguards to protect the licensee from unfair surprise if new allegations are introduced.

[77]240 F.Supp. 7 (E.D. La. 1965) (hereinafter *Ruberoid*). In *Ruberoid*, employees of Ruberoid Company defrauded a second corporation. The court held that the injured corporation could not proceed against Ruberoid Company because the employees were acting in their own interest and against the interests of Ruberoid Company. The employees' adverse interest was envinced by the fact that their fraud resulted in Ruberoid Company's loss of a contract with the defrauded corporation.

could not have been directly addressed to Dr. Scott, who is a non-party,[78] this does not mean Faith could arbitrarily withhold information available to Dr. Scott, its principal. A party must disclose all information not otherwise privileged within its control or available to it.[79] A party may not unreasonably ignore information available to it from outside sources or fail to make good faith attempts to obtain such information.[80] Assuming that the principles of imputed knowledge are relevant to this question, we disagree with Faith's application of pertinent agency law. Faith argues that (1) Dr. Scott acquired the information outside the scope of his agency as president of Faith and (2) as an officer of Wescott, Dr. Scott has interest adverse to Faith *i.e.*, that of avoiding government entanglement. We find Faith's line of reasoning utterly unpersuasive. Under general principles of agency law the fact that an agent has acquired information outside the scope of his agency is irrelevant if he subsequently acts for his principal with the benefit of such information.[81] Faith does not dispute that Dr Scott had actual

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[78]Section 1.323 of the Rules provides that interrogatories may only be addressed to parties.

[79]*See e.g., Schwimmer v. United States*, 232 F. 2d 855 (8th Cir. 1956); *Erone Corporation v. Skouras Theatres Corporation*, 22 F.R.D. 494 (S.D.N.Y. 1958); *Republic of Italy v. De Angelis*, 14 F.R.D. 519 (S.D.N.Y. 1953).

[80]*See e.g., Pilling v. General Motors Corporation*, 45 F.R.D. 366 (D. Utah 1968); *Holland American Merchants Corporation v. Rogers*, 23 F.R.D. 267 (S.D.N.Y. 1959), *Societe International pour Participation Industrielles et Commerciales, SA v. Clark*, 9 F.R.D. 263 (D.D.C. 1949).

[81]*See Mechanics Universal Joint Company v. Culhane*, 80 F. 2d 147 (7th Cir. 1935) *aff'd* 299 U.S. 51 (1936); *In re Kentucky Wagon Manufacturing Company*, 71 F. 2d 892 (6th Cir. 1932); *Pollman v. Curtice*, 255 F. 628 (8th Cir. 1919); *Claris v. Oregon Short Line Railroad Company*, 51 P.2d 217 (Idaho 1935); *John H. Giles Dyeing Machinery Company v. Klauder-Weldon Dyeing Machinery Company*, 135 N.E. 854 (N.Y. 1922); *Henry v. Omaha Packing Company*, 115 N.W. 772 (Neb. 1908).

control over the documents sought in discovery while he served as president of Faith. Faith's own answers to the Bureau's interrogatories indicate that Dr. Scott routinely inspected the requested financial records possessed by Wescott[82] and Dr. Scott himself appears to concede he exercised physical control over at least some of the videotapes in question.[83] Nor does the Commission perceive an adverse relationship between Dr. Scott and Faith. Dr. Scott serves as president of both Faith and Wescott with the concurrence of both organizations. Faith has advanced no evidence that Dr. Scott's dual agency involves deception against either corporation or a conflict of interest. Indeed, Dr. Scott remains Faith's principal spokesman. Thus, both corporations must have been aware that Dr. Scott would deal with information of relevant to both corporations and would be subject to the legal obligations and fiduciary duties appropriate in both capacities. Therefore, it does not avail Faith now to complain that this arrangement proves troublesome to the parties who voluntarily created it.[84]

66. We also reject the argument advanced by Faith concerning the burden imposed by disclosure of the requested financial records. Faith, in submitting no more than highly generalized descriptions of these financial records, relies on *United States for the Use and Benefit of Schneider, Inc. v. Rust Engineering Company*[85] for the proposition that a re-

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[82]*Further Response of Faith Center, Inc. to Interrogatories*, filed July 18, 1979 at 14-5; *Response to the Broadcast Bureau's Second Interrogatories*, filed December 18, 1979 at 20.

[83]Appendix O to *Reply*, filed July 21, 1980, by Faith at 5.

[84]*Cf. Farr v. Neuman*, 199 N.E.2d 369 (N.Y. 1964).

[85]72 F.R.D. 195 (W.D. Pa. 1976). There the defendant had provided the plaintiff with 318,000 pages of financial records, which defendant had indexed. What the court rejected was the plaintiff's request that each of the 318,000 pages be numbered for identification with respect to references in accompanying interrogatories. The court found it more reasonable, in light of the burden on the defendant and the absence of any objection to the sufficiency of specific responses to the interrogatories, for the plaintiff to perform the numbering itself during the course of examining the documents.

sponse to a broadly framed interrogatory need only reflect the broadness of the interrogatory. However valid that proposition may be generally Faith's responses here are unjustifiably unresponsive. Similarly Faith relies on *In re U.S. Financial Securities Litigation*[86] for the proposition that unduly burdensome interrogatories should be stricken. Again, however, the facts simply do not bring this case within the sweep of that rule.

67. We find the ALJ wholly justified in condemning Faith's specific responses to the Bureau's second interrogatories. Several interrogatories call for Faith to identify specific financial records on which its responses are based. However, Faith fails to identify any relevant documents in its response to these interrogatories although the Bureau's interrogatories clearly state that in all instances the date, author, location, and similar information should be furnished for all documents. Examination of Faith's responses to the individual interrogatories reveal them to be wholly inadequate. For example, in response to Interrogatory 3 which inquired into what financial records are consulted by Faith's bookkeepers and accountants, Faith responded: "every bill, record, journal, ledger, individual contribution record, payroll record, account receivable record, contribution receipt to donors, church government report, checking accounts and receipts." In response to Interrogatory 8 which inquired into financial records concerning recent fundraising projects, Faith responded: "Information presented by auditor for Wescott Christian Center, Faith does not

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[86] 74 F.R.D. 497 (C.D. Cal. 1975). In that multi-party proceeding, one of the parties had commenced discovery by serving nearly 3,000 interrogatories, covering nearly 400 pages. Responses by even one party would have cost approximately $24,000. If the other parties had proceeded in kind, the discovery proceedings would clearly have been delayed interminably.

know what documents he consulted." In response to Interrogatory 9 which inquired into documents indicating funds used for specific projects, Faith responded: "Wescott Christian Center cash receipt and disbursement records . . ." In response to Interrogatory 10 which inquired into records indicating the segregation of broadcast funds from other funds, Faith responded: "The audited statements by the independent outside C.P.A. and the C.P.A.'s work papers . . ." In response to Interrogatory 11 which inquired into records in the possession of Wescott, Faith responded: "Faith does not know all of the documents . . ." In response to Interrogatory 32 which inquired into records in the possession of Wescott, Faith responded: "Faith does not know all the documents . . ." and "Faith does not know the identity of 'each financial record referred to . . .' " In response to Interrogatory 34 which inquired into records of Dr. Scott's contributions, Faith responded: "Church disbursement records and work papers of Gary Crane, C.P.A." In response to Interrogatory 36 which inquired into records of Dr. Scott's contributions, Faith responded: "Faith promise pledges and contribution receipt forms in Dr. W. Eugene Scott's possession." In each case Faith either professed ignorance or referred to general classes of records without specifically identifying any.

68. Several of the responses also reflect Faith's contrived interpretation of agency law and claim ignorance of matters concerning Dr. Scott and Wescott. These include: documents in Wescott's possession (Nos. 8, 9, 11, and 32),[87] the officers and directors of Wescott (No. 12),[88] in-

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[87] *See* preceding paragraph.

[88] In effect, Dr. Scott swore that he did not know that he himself was the president of Wescott. In its February 1, 1979 response to the Broadcast Bureau's first interrogatories, Faith told the Commission that Faith and Wescott had the same officers, board of directors, and congregation, and Dr. Scott was the pastor of both churches. By the time of Faith's August 17, 1979 responses, however, Faith reported that Wescott's board of directors had been "reconstituted."

formation concerning videotapes in Wescott's possession (No. 21, 26),[89] Wescott personnel (interrogatory 35), and Dr. Scott's contribution records (No. 36.).[90] In addition, Faith caused needless confusion by responding to interrogatory 4: "Provide the identity of the broadcast programs during which solicitations for money are/were made by Faith officers, directors, and employees' . . ." with the comment ". . . Faith's answer only includes those programs produced and presented by "Faith officers, directors, and employees acting in their capacity as 'Faith officers, directors, and employees'."

69. Additionally, Faith was unresponsive to interrogatory 15, which asks Faith to describe the duties and responsibilities of Wescott directors, officers, and employees which related to the operation of KHOF-TV or monies solicited. Faith replied simply by listing names and titles.

70. Viewing Faith's discovery performance in light of all of the circumstances, we conclude that Faith's renewal application should be dismissed. During these proceedings, Faith has consistently acted in a manner that not only displays bad faith but has seriously impaired the Commission's ability to make an accurate determination of the matters in issue. Faith has consistently proffered essentially the same objections about specificity, constitutional principles, and the alleged separation between Faith and Wescott. While Faith's constitutional claims were not finally put to rest until the Court of Appeals summarily dismissed its appeal on

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[89]As previously indicated, Faith had already failed to comply with the ALJ's Order to produce these tapes. Dr. Scott concedes that some of these tapes were kept in an employee's apartment at Scott's direction. *See* para. 84 *et seq., infra*.

[90]Continuing the pattern of its responses to the first interrogatories, Faith does not provide specific information regarding Dr. Scott's contributions although Faith concedes Dr. Scott has the pertinent records in his possession.

these grounds, after that time Faith's continued unresponsiveness on those grounds to both rounds of discovery at issue is totally without justification. Faith's unresponsiveness prior to judicial dismissal of its appeal might not have warranted dismissal of its application. However, after that ruling Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process clearly warranting dismissal of its application. Similarly, its other grounds for noncompliance with discovery Orders, grounds which do not rise to the level of constitutional privilege, were properly rejected by the ALJ, and we perceive no basis for concluding that Faith's continued unresponsiveness on these grounds was justified.

71. Faith's unresponsiveness has seriously compromised the public's right to know whether a television broadcast station is being operated in the public interest. Even where Faith has revealed information, it has required extraordinary effort on the part of the Commission to acquire it. Much information still sought remains withheld. Moreover, as will be seen, although Faith was aware from the very beginning of these proceeding of the availability of the Commission's distress sale policy, Faith elected to exercise that option only after a year or tortuous and futile proceedings.

72. In the Commission's view, Faith's pattern of behavior in these proceedings constitutes a grave abuse of the Commission's processes. Judicial and quasi-judicial forums have the inherent power to protect the integrity of their processes and the public from this type of abuse by dis-

missing the offender's case.[91] We have made this the policy of the Commission.[92] Faith's assertion of alleged First Amendment rights does not, in itself, make this sanction any less appropriate. We determined that reliance on these asserted rights to avoid discovery to be baseless and had so informed Faith prior to discovery.[93] Therefore, we shall dismiss Faith's application with prejudice.

VI. Broadcast Bureau Conduct

73. Faith lists seven examples of what Faith describes as conduct by the Broadcast Bureau designed to deprive Faith of due process. These are: (1) The Bureau's field investigation violated the "Wiley Guidelines" and the Bureau's October 31 1977 letter incorrectly summarized the results of the investigation; (2) The Bureau refused to disclose the substance of its informants' statements and delayed the taking of their depositions until a time inconvenient to Faith; (3) the Bureau failed to call or depose a witness, Joe Shackelford, who allegedly would corroborate allegations against Faith; (4) The Bureau failed to make a statement by its informants available to Faith; (5) The Bureau failed to complete the exchange of exhibits; (6) the Bureau opposed issuance of a subpoena *duces tecum* to Wescott and (7) the

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[91] *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); *Link v. Wabash Railroad Company*, 370 U.S. 626 (1962); *Montgomery v. CIR*, 367 F. 2d 917 (9th Cir. 1966). *Compare Societe International v. Rogers*, 357 U.S. 197 (1958) (Dismissal not justified where inability to comply with discovery requests due to circumstances beyond party's control).

[92] *Vue-Metrics, Inc.*, 69 FCC 2d 1049 (1978) *aff'd*, 615 F. 2d 1369 (D.C. Cir. 1980) (discussed *infra* at para. 80).

[93] *See Lyons v. Johnson*, 415 F. 2d 540 (9th Cir. 1978) (5th amendment). *Cf. Barenblatt v. United States*, 360 U.S. 109 (1959) (contempt of congress conviction upheld over claimed infringement of right to free association). *Compare Campbell v. Gerrans*, 592 F. 2d 1054 (9th Cir. 1979) (4 of 34 interrogatories were unanswered but were questionable and presented clear 5th amendment problems; however, failure to answer could be basis for adverse inference at trial).

Bureau has opposed deposition of its own personnel. The Bureau has not responded to these allegations.

74. We find no substance in any of Faith's allegations, and in any event, we do not see how the Broadcast Bureau's alleged misconduct justifies in the least Faith's own improper behavior. With respect to Faith's individual allegations, we make the following findings as to the allegations listed in the preceding paragraph: (1) We have already rejected Faith's complaints concerning the September 1977 field investigation insofar as they are reflected on the record before us in our June 15, 1978 by direction letter and in the instant Order. If Faith wished to develop additional evidence concerning the investigation it would have had the opportunity to do so at the hearing. (2) Faith has received a bill of particulars and has had the opportunity to depose the Bureau's informants; no prejudice to Faith is evident.[94] (3) If Faith wished to have Shackelford deposed or to call him as a witness, it was free to take the initiative to do so. (4) The Commission's rules do not require making the informants' statement available until after the informant testifies.[95] (5) We see no malfeasance by the Bureau in the materials cited by Faith. The Bureau states that it has provided Faith those exhibits available to it and that it would provide additional exhibits when and if they became available.[96] (6) The Commission agrees with the ALJ that in view of the relationship between Faith, Westcott, and Dr. Scott, the requested subpoenas to Wescott are frivolous.[97] (7) The

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[94]*See also* Broadcast Bureau's Response to Interrogatories Propounded by Faith Center, Inc., filed February 1, 1979.

[95]Section 1.362 of the Rules. The Broadcast Bureau claims it released a copy of informant Baumgartner's statement to Baumgartner for transmission to Faith.

[96]Broadcast Bureau letters of November 7, 1979, and March 14, 1980.

[97]*See* FCC 79M-1001, released August 28, 1979

Commission's rules do not provide for the routine deposition of Commission employees.[98] Faith's desire to observe these employees' demeanor does not justify waiver of the usual rule.

VII. Distress Sale

75. Faith claims that dismissal of its renewal application contravenes the Commission's distress sale policy[99] and urges that its distress sale request be granted. Faith asserts that on January 10, 1979, Faith timely informed the Commission of its intent to explore the possibility of a distress sale, but that it elected to continue with discovery in the interim as a demonstration of good faith and to pursue its constitutional claims. Faith explains, however, that it never elected to forego a distress sale and that in view of other procedural delays, there was no urgency in making a distress sale election. When, on October 30, 1979, Faith notified the ALJ its intention to seek a minority purchaser, the ALJ, in Faith's view, was not justified in rejecting Faith's election. Faith interprets Commission policy as permitting a licensee to elect a distress sale at any time prior to or even shortly following the commencement of the hearing. Accordingly, the ALJ may not usurp the Commission's power to act on the distress sale proposal. Faith submits that it was forced to elect a distress sale at the time because it could not prepare for trial as a result of the burdensome discovery process. Faith asserts that the presiding judge should have

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[98] Section 1.311(b)(2) of the Rules.

[99] *See Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978) and *Clarification of Distress Sale Policy*, 44 RR 2d 479 (1978). The policy permits, subject to the limitations discussed below, a licensee designated for a renewal or revocation proceeding to assign the license to a minority purchaser at a price at or less than 75% of full market value. *Lee Broadcasting Corporation*, 76 FCC 2d 462 (1980).

taken into account that approving the distress sale proposal could have promoted minority participation in broadcasting in a major market and avoided a protracted hearing. Even yet, claims Faith, a distress sale could avoid further proceedings including appellate litigation. Faith denies that it sought a distress sale in bad faith.[100]

76. The Broadcast Bureau responds that Faith has abused the Commission's distress sale policy and should not be rewarded for doing so. The Bureau observes that Faith had apparently contemplated a distress sale as early as November 1978,[101] and had no justification for failing expeditiously to decide one way or another and to inform the Commission of its intentions in this regard. The Bureau submits that Faith already had begun negotiations with TELACU prior to notifying the ALJ that it intended to seek such a buyer. Instead, claims the Bureau, Faith subjected the Commission to pointless discovery proceedings every bit as draining on Commission resources as many hearings the distress sale policy was designed to obviate. According to the Bureau, Faith has attempted to evade Commission scrutiny for as long as possible and has elected to pursue a distress sale only when the hearing or dismissal became imminent. Commission policy, argues the Bureau, does not countenance "playing roulette" with the Commission's processes in this manner. The Bureau claims that in the proceedings cited by Faith, the licensee had promptly elected a distress sale and that Faith's original petition for special relief was both incomplete and violative of Commission's rules.

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[100]TELACU's appeal raises essentially the same points as Faith's.

[101]In a telegram to the Commission dated November 21, 1978, Faith had asked the Commission for a 30 day extension of time in which to advise the Commission whether it intended to elect a distress sale.

77. The Commission rejects Faith's contentions at least as they relate to KHOF-TV. First, we believe that Faith was intentionally dilatory in electing a distress sale. Second, we do not believe that distress sale policy should be used to permit an applicant to avoid the consequences of bad faith obstruction of Commission proceedings. Third, not only would a distress sale here fail to conserve resources by avoiding a hearing but Faith has already wasted substantial resources expended in the pointless discovery proceedings.

78. Contrary to Faith's assertions, we do not think Faith had any justification for not making a prompt decision whether to pursue a distress sale after raising the possibility in its January 10, 1979 letter. Faith was well aware that a prompt decision would be desirable. At the prehearing conference on January 19, 1979, Judge Head expressed his concern that deferring the decision whether to seek a distress sale might result in onerous and unnecessary discovery proceedings, and noted that in a recent case he had continued discovery for a period of five months to permit the licensee to seek a minority purchaser.[102] Observing that the Commission's policy was unclear on the relationship between discovery and distress sales, Judge Head solicited the parties' views. Broadcast Bureau counsel urged that discovery continue — consistent with its position on the prior case — on the grounds that Faith would not go forward with a distress sale until it had learned its chances of losing its license during discovery. Faith's counsel, however, apparently disagreed, and suggested that "we are, in a position, I think in a sense, to make an evaluation with or without discovery of whether we want to go forward with the

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[102] *See* Tr. 75-80. Judge Head referred to *Street Broadcasting Corporation*, 44 RR 2d 1630 (ALJ 1979).

case."[103] Faith's counsel further suggested that if the presiding judge felt it would be conducive to the efficient dispatch of the schedule, Faith's counsel wished to discuss with Faith the possibility of coming in with a motion for a continuance. The ALJ then stated that he had no opinion one way or another at that point whether discovery should be continued.[104] The ALJ set a date of May 29, 1979 as the date requests for continuances had to be submitted and admonished Faith's counsel that if an attempt were made to effectuate a distress sale in May or June he would take into account the time already expended.[105]

79. In light of the fact that the presiding judge specifically called Faith's attention to the undesirability of onerous and unnecessary discovery proceedings, we believe it is inexcusable for Faith to have waited nine full months to move for special relief — and then only to seek a continuance of another 180 days to negotiate a distress sale. Clearly, Faith could have foreseen that protracted prehearing proceedings would result when Faith filed an initial response to the Broadcast Bureau's first interrogatories which objected in whole or in part to fully half of the interrogatories posed and, thereafter, pursued judicial review of the resulting discovery Orders. Nor do we think Faith had justification for failing to act promptly following the dismissal of its judicial appeal on July 13, 1979. When Faith did finally elect to pursue a distress sale on October 30, it made no attempt to explain its failure to seek a continuance earlier but instead offered the bland assertion that it relied on Commission policy that a distress sale could be

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[103]Tr. 78-9.

[104]In its January 10 letter, Faith indicated that it would make its distress sale election by February 27. *See* n. 9, *supra*.

[105]Tr. 86.

elected prior to or shortly following the commencement of hearing. We can only conclude that Faith totally ignored the legitimate concerns voiced by the ALJ and recognized by Faith's counsel. In formulating the distress sale policy we did not intend to undercut the authority of the ALJ to regulate the course of the hearing.[106] The ALJ bears the important responsibility of insuring that administrative proceedings, including discovery, are expeditiously and fairly conducted. Consequently, the ALJ has broad discretion to control the course of the proceedings.[107] To permit a party to ignore the ALJ's valid Orders and frustrate with impunity the ALJ's attempts to bring about an orderly hearing of the issues would undercut the ALJ's authority and contravene the public interest.[108] Therefore, we will not permit the distress sale policy to be used to this effect. A distress sale, contrary to the views of Faith and TELACU is a form of extraordinary relief and depends on the facts and circumstances of the individual petition. Although distress sales are generally granted, they are not a matter of right. We have stated from the outset that "All such transactions will be scrutinized closely to avoid abuses"[109] and that "licensees generally cannot be permitted, far less encouraged, to knowingly play roulette with Commission licensing processes."[110] These statements elaborate upon those in the *Policy Statement* and *Clarification* suggesting that distress sale relief will be available until the initiation of the hearing.

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[106]Administrative Procedure Act §556(c), 5 U.S.C. §556(c) (1977); Section 1.243 of the Rules.

[107]*See Discovery Procedures*, 11 FCC 2d 185, 187 (1968); *Tinker, Inc.*, 4 FCC 2d 372 (1966); *Chronicle Broadcasting Company*, 20 FCC 2d 728 (Rev. Bd. 1969); *WSTE-TV, Inc.*, 13 FCC 2d 848 (Rev. Bd. 1968).

[108]*Vue-Metrics, Inc., supra* at 1058.

[109]68 FCC 2d at 983.

[110]44 RR 2d at 481.

Thus, it would be unreasonable for Faith to rely on the availability of a distress sale to allow itself to abuse our processes and defy the ALJ. While we would not impose any rigid timetable for electing a distress sale, we would expect a licensee to proceed expeditiously in assessing its position and announcing its intent.

80. However, what we have here is not simply a dilatory election of a distress sale. Here, approval of a distress sale would serve to shield Faith from the consequences of bad faith obstruction of the Commission's processes. We do not think this should be permitted. The Commission faced a similar situation in *Vue-Metrics, Inc.*[111] There an applicant was dilatory in responding to discovery regarding the financial ability of its principals. After extended delay had occurred in producing the desired information, the applicant attempted to moot the issue by amending its application with a new financial showing. Although the Commission recognized that permitting the amendment would have the desirable effect of preserving a comparative choice, the Commission concluded that the injury to the integrity of the administrative process that would occur if the Commission ignored the applicant's misconduct outweighed this benefit, and the Commission dismissed the application.

81. We addressed a somewhat similar question in *Bartell Broadcasting of Florida, Inc.*[112] and *Stereo Broadcasters, Inc.*[113] *There, the Commission denied distress sale requests in two "transition cases" — i.e.*, cases in hearing at the time the distress sale policy was first announced — in which an initial decision had already issued at the time

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[111]N. 92, *supra*.

[112]45 RR 2d 1329 (1979).

[113]74 FCC 2d 543 (1979), *appeal pending* Case No. 79-2412 (D.C. Cir.).

of the distress sale request. The Commission reasoned that a distress sale at that point would be undesirable (1) because the opportunity to conserve hearing resources had been lost and (2) once an administrative decision had issued, the public interest and the integrity of the administrative process would not be served by granting a distress sale. We think similar reasoning applies here. The record discloses ample grounds for terminating these proceedings for Faith's failure to prosecute its application. Given this determination, we do not believe the public interest or the integrity of the administrative process would be served by ignoring this conclusion.

82. Faith argues that it is entitled to distress sale relief if it files such a petition at any time prior to the commencement of the hearing. This argument ignores the fact that Faith's failure to respond to valid discovery Orders over an extended period of time was a major reason for extensive delays in the commencement of the evidentiary hearing. The ALJ's granted continuances for the express purpose of giving Faith additional time to respond to discovery requests. They also warned the licensee to make its election to seek distress sale relief early in the proceedings, a recommendation which, if followed, would have prevented an unnecessary waste of Commission resources. Faith did not file its petitions until February 29, 1980 — almost exactly one year from the February 27, 1979 date proposed in Faith's letter, and seven months after the Bureau filed its motion to dismiss for failure to prosecute. And even when it did file, the petition was incomplete — it failed to include two appraisals as required by *Northland Television Inc.*,[114] the controlling precedent at that time. Hence, we reject the proposition that a licensee is entitled to extraordinary relief

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[114] 72 FCC 2d 51 (1979).

merely because it makes its election prior to the start of the hearing. The ALJ has the discretion to consider the request in light of the entire course of the proceedings. Of course a complete petition, filed early in the proceedings, carries a presumption of validity.

83. Our disposition of Faith's appeal necessarily results in partial denial of Faith's petition for special relief. That petition proposes the sale not only of KHOF-TV, San Bernardino, the station immediately at issue, but also co-owned stations KVOF-TV, San Francisco, California, and WHCT-TV, Hartford, Connecticut. The Commission will consider this matter in a separate Order and at that time determine the effect of this proceeding on the respective assignments.[115]

VIII. *Broadcast Bureau's Newly Discovered Evidence*

84. The Broadcast Bureau proffers newly obtained affidavits, which the Bureau claims discloses additional abuse of process and misrepresentation by Faith. These affidavits were executed by former Faith employees Susanna C. Decin and David Footitt.[116] Both affidavits relate to tapes and documents which Faith claimed were unavailable for discovery because they were in the possession of Faith's sister church Wescott. According to the affidavits, however, the tapes

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[115]Petitions to deny have been filed against the Hartford assignment, on June 13, 1980, by The Department of Communications of the Capitol Region Conference of Churches, the Communications Management Team of the Christian Conference of Connecticut, and eight named petitioners and against the San Francisco assignment on June 30, 1980, by Together Medic Ministries and the Inter-Faith Communications Commission. The Broadcast Bureau requested in a pleading, filed July 10, 1980 to be permitted to file comments following disposition of Faith's appeal here. The Bureau will have that opportunity in the forthcoming proceedings.

[116]Susanna C. Decin is now Mrs. David Footitt. For clarity's sake, however, we will continue to refer to her as Decin.

and documents were in fact deliberately concealed at the behest of Faith's president, Dr. Scott.

85. Footitt recites that he was employed by Faith from 1976 through 1979 and served as Dr. Scott's "right-hand man." He relates that Dr. Scott pursuant to the so-called "wild geese" plan rented several trucks, which were used to transport potentially incriminating tapes and documents to be secreted in a Phoenix, Arizona warehouse. Footitt appends copies of truck and warehouse receipts to his affidavit. Footitt states that other material was transported to northern California, and several tapes were hidden in Footitt's apartment in October 1979. Appended to Footitt's affidavit is an alleged receipt from Faith's attorney Edward Masry for the concealed tapes. Footitt also states that when the Broadcast Bureau attempted to depose Faith employees in October 1979, Dr. Scott advised the employees to avoid service by United States marshals. Dr. Scott, Footitt, and Decin allegedly went into hiding in Dr. Scott's Lake Almanor house. Footitt also accuses Dr. Scott of initiating lawsuits to harass potential opponents and discourage investigation.

86. Decin corroborates Footitt's affidavit with respect to the "wild geese" plan, and the avoidance of service by United States marshals. In addition, Decin describes an allegedly fraudulent letter submitted by Faith to the Commission as part of Faith's August 17, 1979 responses to the Broadcast Bureau's first interrogatories. The letter, appended as an exhibit to Decin's affidavit, appears on its face to be from Wescott to Faith. The letter apparently informs Faith that Wescott will not turn over tapes and documents in its possession to Faith because of concerns over Faith's financial performance and government entanglement, and because to do so would be unduly burdensome. The letter chides the Commission for not requesting the

tapes and documents directly from Wescott. The letter is signed by Decin as Secretary of Wescott and dated August 13, 1979. Decin now states that the letter is a fabrication prepared by Dr. Scott, who coerced Decin — never an officer of Wescott — into signing it. Decin claims the use of Wescott was a sham designed to frustrate the Commission. Decin further claims that Faith had been negotiating for the distress sale of its stations long before it first elected such a sale in October 1979. As confirmation, Decin attaches what she describes as a draft letter agreement tendered by Inter-American Broadcasting, Inc. (a subsidiary of TELACU) dated May 10, 1979, and signed by David C. Lizarraga. In view of this draft agreement, the Broadcast Bureau argues that Faith was deliberately dilatory in electing a distress sale.

87. In response, Faith tenders affidavits by Dr. Scott, attorney Michael Goch, and eleven Faith employees. Dr. Scott states that Wescott is not a sham but rather a church formed prior to Dr. Scott's association with Faith. According to Dr. Scott, Wescott insisted on retaining ownership of Dr. Scott's tapes from the inception of Dr. Scott's association with Faith. Contrary to Decin's allegations, Dr. Scott maintains that the letter from Wescott to Faith was the result of a legitimate meeting of Wescott's Board and that Decin was in fact a bona fide corporate officer of Wescott. As to Footitt's allegations, Dr. Scott apparently concedes that documents and tapes were removed from the state of California and that he placed videotapes — which Dr. Scott characterizes as exculpatory — in Footitt's custody. Scott explains this as fulfilling his commitment to preserve this material from government encroachment, a threat which he foresaw based on California state government actions against other religious groups. Scott also concedes that he, Footitt, and Decin went to his parent's home in Lake Al-

manor, but denies this was to avoid service.[117] Scott further explains that he filed lawsuits against Commission employees and informants for the purpose of establishing Faith's constitutional rights and not for the purpose of harassment. Faith also claims that Footitt and Decin were fired for embezzlement and later attempted to blackmail Faith.[118] Faith points out that Decin and Footitt have given depositions exonerating Dr. Scott and inconsistent with their present affidavits.[119] Faith states that it was informed by the Broadcast Bureau that a distress sale election could be made at least up to the commencement of the hearing.

88. More generally, Faith objects to the consideration of the Broadcast Bureau's affidavits at all. Faith argues that it is improper for an appellate body to consider material not presented to the judicial officer making the decision being appealed from.[120]

89. While the Commission believes that the contradictions between the material submitted by the Broadcast Bureau and by Faith raises a substantial question of fact, we are not able to resolve these questions without further hearings.[121] Moreover, as we have dismissed Faith's application

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[117]The eleven employees state they did not attempt to avoid service. As Faith reports, however, the Bureau was unable to serve 14 of its 15 prospective deponents. *Response to Broadcast Bureau's Second Interrogatories and Opposition to Second Motion for Production of Documents*, filed October 24, 1979.

[118]Footitt and Decin claim that Dr. Scott fired Footitt and Decin quit because Dr. Scott disapproved of their marriage. They further state that Dr. Scott has initiated a harassing lawsuit against them.

[119]Footitt and Decin maintain these depositions were given under duress.

[120]*Citing United States v. Gray*, 611 F. 2d 194 (7th Cir. 1979); *Rosen v. Lawson-Hemphill, Inc.*, 549 F. 2d 205 (1st Cir. 1976); *Commonwealth of Massachusetts v. United States Veteran Administration*, 541 F. 2d 119 (1st Cir. 1976)

[121]Faith does admit, however, that Dr. Scott ordered tapes of his broadcasts placed in Footitt's apartment. While the question of Dr. Scott's intent is disputed, we think we may take official notice of Dr. Scott's control of the tapes and documents. *See* para. 87, *supra*.

irrespective of the proffered new material it is not necessary for us to reach these questions.[122]

90. ACCORDINGLY, IT IS ORDERED, That the Request for oral argument, filed July 25, 1980, by Faith Center, Inc. IS DENIED.

91. IT IS FURTHER ORDERED, That the appeal of FCC 79M-1466, released December 13, 1979, by Faith Center, Inc. IS DENIED and FCC 79M-1466 IS AFFIRMED.

92. IT IS FURTHER ORDERED, That the motion for leave to intervene, filed May 7, 1980, by TELACU IS GRANTED.

93. IT IS FURTHER ORDERED, That, the appeals of FCC 80M-459, released March 17, 1980, filed May 7, 1980, by Faith Center, Inc. and TELACU, ARE DENIED; FCC 80M-459 IS AFFIRMED; the application for renewal of

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[122]Several collateral matters remain to be disposed of. (1) As TELACU has demonstrated an interest in these proceedings and its participation will be helpful, TELACU's petition to intervene, filed May 7, 1980, will be granted. *See Max M. Leon, Inc.*, 73 FCC 2d 796 (1978); (2) As we do not feel oral argument will be helpful in this instance, the request for oral argument, filed July 25, 1980, by Faith will be denied; (3) On February 13, 1980, Inspiration Media, of Southern California, Inc. moved to consolidate this proceeding with that involving station KHOF(FM), a comparative prooceeding in which IMSC is a competing applicant. This dismissal of this proceeding having rendered the matter moot, the motion will be dismissed; (4) Good cause having been shown, late filed affidavits, filed July 22, 1980, by Faith will be accepted; (5) A reply filed July 21, 1980 by TELACU will be accepted. The Broadcast Bureau's opposition implicitly addressed both Faith's and TELACU's appeals. (6) A letter pleading dated July 22, 1980, written by the Reverend W. Eugene Scott will be stricken as an unauthorized reply. (7) A motion for leave to intervene filed by the Faith Center Department of Development Trust Fund on September 19, 1980 will be denied. In view of the fact the Trust Fund is represented by Dr. Scott who is already participating in this proceeding as president of Faith, and there is no indication that the Trust Fund's position differs in any way from Faith's, we do not see how the Trust Fund's participation would assist the Commission. *See WLCY-TV, Inc.*, 46 CCC 2d 860 (Rev. Bd. 1974); Section 1.223(c) of the Rules.

license for station KHOF-TV, San Bernardino, California, filed August 1, 1977, by Faith Center, Inc. IS DISMISSED WITH PREJUDICE, and this proceeding IS TERMINATED.

94. IT IS FURTHER ORDERED, That Faith Center, Inc. IS AUTHORIZED to continue to operate KHOF-TV until 12:01 a.m. December 28, 1980, PROVIDED, HOWEVER, that if licensee seeks reconsideration or judicial review of our Memorandum Opinion and Order, it is authorized to continue to operate the station until thirty (30) days after the forum which has jurisdiction to review this proceeding issues its mandate.

95. IT IS FURTHER ORDERED, That the Petition for Special Relief, filed February 29, 1980, by Faith Center, Inc. IS DENIED IN PART consistent with the opinion rendered herein.

96. IT IS FURTHER ORDERED, That the motion for consolidation, filed February 13, 1980, by Inspiration Media of Southern California, Inc,. IS DISMISSED as moot.

97. IT IS FURTHER ORDERED, That good cause having been shown, the request for leave to file late filed affidavits, filed July 22, 1980, by Faith Center, Inc., IS GRANTED.

98. IT IS FURTHER ORDERED, That the motion to dismiss filed July 31, 1980, by the Broadcast Bureau, to strike the reply, filed July 21, 1980 by TELACU, IS DENIED.

99. IT IS FURTHER ORDERED, That the opposition, filed August 8, 1980, by the Broadcast Bureau, to strike the motion to dismiss, to recuse or to remand, filed by the Reverend W. Eugene Scott IS GRANTED, and the subject pleading IS STRICKEN.

100. IT IS FURTHER ORDERED, That the motion for leave to intervene, filed September 19, 1980, by Faith Center Department of Development Trust Fund IS DENIED.

101. IT IS FURTHER ORDERED, That the request for leave to file unauthorized pleading, filed August 22, 1980, by the Broadcast Bureau IS GRANTED to the extent consistent with the foregoing opinion and otherwise IS DENIED and the Broadcast Bureau's Comments on Reply, filed August 22, 1980 IS ACCEPTED for filing to the extent consistent with the foregoing opinion.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*.

APPENDIX D.

Order Extending Time to File Petition for Writ of Certiorari.

Supreme Court of the United States.

No. A-210.

Faith Center, Inc., Petitioners, v. Federal Communications Commission.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 10, 1983.

/s/ Warren E. Burger
Chief Justice of the United States.

Dated this 26th day of September, 1983.

APPENDIX E.

Provisions Involved.

1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

— United States Constitution, Amendment I

2. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

— United States Constitution, Amendment V

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his

legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

American Bar Association, *Model Code of Professional Responsibility*, Disciplinary Rule 4-101.

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and

"secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 (C) through an employee.

Rules of Professional Conduct of the State Bar of California.

Rule 4-101. Accepting employment adverse to a client

A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.